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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-677

RONNY G. SAYLORS, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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RONNY G. SAYLORS, *et al.*,

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the judgment entered in these cases.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit, *sub nom. Collins v. Schlesinger*, and consolidated cases, Nos. 75-2935, 75-2967, 75-3238, 75-3432, 75-3348, 75-3559, is not yet reported and is appended hereto as Appendix A, as is that court's earlier "Memorandum".

The respective opinions and orders of the United States District Courts for the Southern District of California the Central District of California and the District of Hawaii, are unreported and are appended hereto respectively as Appendices B, C and D.

Jurisdiction.

The opinion of the United States Court of Appeals for the Ninth Circuit *sub nom. Collins v. Schlesinger,* was entered on September 27, 1976. This Court has jurisdiction to review the judgment below under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the petitioners, who, prior to the expiration of their then current enlistment periods in the United States Navy, were induced by the respondent United States to agree to extend their periods of enlistment (*i.e.,* to re-enlist) on the promise of payment of a certain re-enlistment bonus based on a statute then in effect, may be denied *both* release from their re-enlistment agreement *and* payment of that promised bonus solely because of the repeal of the statute authorizing such re-enlistment bonus.

2. Whether under the aforesaid facts there was a binding contract between petitioners and the respondent United States to which the Fifth Amendment of the Constitution of the United States applies and if so, whether said contract, construed in the manner required to avoid a serious constitutional question, was breached by respondent.

3. Whether under the aforesaid facts the respondent United States is estopped from denying to the petitioners the re-enlistment bonus which was promised to them by it.

4. Whether Public Law 93-277, amending 37 U.S.C. §308(g) (1968) by deleting said sub-section, required the respondent to refuse to pay the promised re-enlistment bonus to the petitioners who had re-enlisted prior to said repeal.

5. Whether petitioners are entitled to *habeas corpus* release from military service because of the refusal of respondent United States to pay them the promised re-enlistment bonus which induced petitioners to enter into re-enlistment agreements, as an alternative to or substitute for money damages.

Constitutional, Statutory and Regulatory Provisions Involved.

The applicable constitutional provisions, statutes and regulations are set forth at Appendix E, *infra,* pp. 45a *et seq.*

Statement of the Case.

Eight hundred and twenty-three Navy enlisted personnel brought these actions in the United States District Courts in Honolulu, Los Angeles, and San Diego founding jurisdiction for money damages upon the Tucker Act, 28 U.S.C. §1346(a)(2). In the alternative, they sought release from the service through *habeas corpus* pursuant to 28 U.S.C. §2241.

The facts are not in dispute. In 1965 the Department of Defense sought congressional authority to establish a system of incentive bonuses to increase the rate of retention in service of persons in highly technical military occupational specialties by inducing such specialists to re-enlist. 37 USC §308(g) (1968). 79 Stat. 547, *as amended,* 82 Stat. 1314-1315. See Appendix E at p. 48a. The program enacted by Congress, and extensively employed by the Navy to procure extensions of enlistment periods from Navy enlistees, provided a system of incentive bonuses based upon the enlisted member's monthly base pay times the number of years of the re-enlistment term times a "variable multiple" factor. It was planned that the "variable

multiple," to be administratively set, would be increased or decreased in particular Navy occupational specialties ("rates") depending upon the Navy's levels of and need for manning in particular rates. The bonus was payable in installments or in lump sum, commencing at the time of the re-enlistment required by the agreement.

The Navy made extensive use of this Variable Re-enlistment Bonus (hereinafter "VRB") incentive, particularly in recruiting and inducing extensions of the enlistment periods of personnel for training in its Nuclear Field and Advanced Electronics Field programs. Provisions of military regulations authorized respondent to, and it did, induce enlisted personnel to obligate themselves years in advance (often at the very time of the initial enlistment sought to be extended), to extend their term of service beyond the term of their initial enlistment. The Navy required personnel to obligate themselves to an additional term of two or three years beyond their initial three or four year enlistment term *in order to qualify for training* in any of the bonus-eligible specialties, as well as to secure the promise of the VRB.[1]

The Navy diligently sought to identify personnel with the requisite intelligence and other personal attributes for training in these critical specialties, and in-

[1]Although it could, under the applicable laws and regulations, have attempted to enlist these personnel for straight 6-year terms without any VRB inducement (10 U.S.C. §505[c]), the Navy used 3- or 4-year enlistment terms plus agreements for 2- or 3-year extensions (*i.e.*, a total commitment of six years) with promises to pay the VRB, in order to secure the high calibre personnel sought for this 6-year program (citation). See Finding of Fact No. 9, Aikin & Saylors Record at p. 294; Adams Record at pp. 328-329, and Appendices B & C at pp. 14a-15a and p. 25a. *Accord: Larionoff v. United States*, 365 F.Supp. 140, 143 (D.D.C. 1973); *aff'd*, 533 F.2d 1167 (D.C. Cir. 1976).

formed all prospects that if they bound themselves to two or three additional years of service (so that their total enlistment obligation would be six years) they would receive a Variable Re-enlistment Bonus at the time they began their extended periods of service. As a result, each of the petitioners, at some time after June 1, 1970, enlisted in the Navy for a period of three or four years and, either at the time of enlistment or shortly thereafter, executed an "Agreement to Extend Enlistment" that obligated each to an additional two or three years of service after the initial term. Each of the petitioners completed his or her initial term, re-enlisted as per the agreement and each of them concededly had met all of the requirements each had to perform for payment of the VRB at the time the litigation was instituted. (Finding of Fact No. 7.) See Appendices B and C at p. 14a and p. 25a.

Each petitioner understood that he or she would receive a VRB, payable at the time of commencement of the re-enlistment period. See *Collins v. Schlesinger, infra,* at Appendix A. p. 5a. Each petitioner was induced to enter this particular re-enlistment agreement by each's reasonable expectation of payment of a VRB and would not have agreed to extend his or her enlistment absent the promise of the VRB (see *id.* at p. 2a).

Each of the petitioners executed a document entitled "Agreement to Extend Enlistment". Whereas the standard enlistment agreement does not specify the consideration for the enlistment but merely states that the service will be performed "under the conditions provided by law", "Agreement to Extend Enlistment" provided that the enlistment is extended ". . . in consideration of the pay, allowances and benefits which will accrue to [him or her] during the continuance of [his or her] service."

The events that led immediately to this litigation were succinctly stated by the Judicial Panel on Multi-District Litigation in a proceeding commenced after this case had been docketed on appeal:[2]

> "In mid-1974, Congress eliminated the mandated payment of the VRB. Each plaintiff whose reenlistment was to commence on June 1, 1974, or within the following four years, was advised by the Navy that it was no longer obligated to pay the VRB. The Navy took the position that Congress' action was retroactive, thereby negating the VRB provisions in any reenlistment agreement executed prior to June 1974. Nevertheless, plaintiffs were required by the Navy to re-enlist pursuant to their agreements, and any plaintiffs refusing to do so were subject to court-martial proceedings."

It is contended by respondent that Public Law 93-277, which amended 37 U.S.C. §308 and eliminated subsection (g) thereof thus barred all payments of the VRB after June 1, 1974, the effective date of such legislation to these petitioners even though the agreement to pay the VRB, and petitioner's change in status had been made prior thereto. *There is no language in the bill, however, providing that it had the retroactive effect urged by respondent successfully in the Court of Appeals below.*

The district courts below held that the right to receive a VRB was an integral part of the contract

[2]*In re U.S. Navy Variable Re-enlistment Bonus Litigation,* 407 F.Supp. 1405, 1406. (J.P.M.D.L. 1976). The Panel declined, without prejudice, to transfer any actions, principally on the ground that, by the date of their decision, the litigation was "dominated by appellate activity".

between each plaintiff and the Navy, since the promises which induced the extension agreements and detrimental change in each petitioner's status were authorized by law at the time that the agreements were signed. Having concluded that the Navy was *contractually* bound to pay each of the servicemen the promised VRB, the district courts considered the principal issue of the cases to be whether Congress could retroactively alter the contracts between petitioners and the Navy and yet allow the Navy to continue to demand performance thereof by petitioners. The courts held that Congress possessed no power to alter the contracts entered into prior to the enactment of said Public Law 93-277, since that public law was an economy move and contracts may not be lawfully breached for purely fiscal reasons.

Therefore, the trial courts ruled, the VRB rightfully owed to each of the plaintiffs should be paid, and the courts entered judgments to that effect against the United States. The Court of Appeals below reversed, holding that "bonuses are a form of pay entitlement . . . 'dependent upon statutory right' and not 'common law rules governing private contracts.' " The opinion recognized that although petitioners' bonus "expectations" are "not unreasonable", they "must be disappointed to serve the common good as perceived by Congress." See *Collins v. Schlesinger,* Appendix A, at p. 1a.

REASONS FOR GRANTING THE WRIT.

The holding of the Court of Appeals below that petitioners are not entitled to the payment of the VRB erroneously concludes that petitioners did not acquire enforceable contract rights with respect to payment of the VRB at the time that they were induced to extend their enlistments upon the promise of such payment; fails to apply the applicable terms of developing military law and contract law of this and the lower federal courts to the extension agreement executed by petitioners; fails to consider principles of equitable promissory estoppel and pursuant thereto to hold that the respondent was estopped from denying petitioners the VRB which it had promised them; and interprets the relevant statutes and regulations in a manner inconsistent with the requirements of fundamental fairness and with the command that property may not be taken without due process of law as required by the Fifth Amendment to the Constitution of the United States. And, the court below misconstrued and misplaced decisions of this court relating to the questions herein presented. Finally, the writ should also be issued in order to resolve the existing conflict among the various circuits on the precise issues presented by this petition.

1. The Department of Justice has stated on behalf of the United States in the Petition for Certiorari presently pending before this Court in the case of *United States v. Larionoff, supra;* No. 76-413.

> "The court's holding on the variable bonus issue presented here squarely conflicts with the Fourth Circuit's decision in *Carini v. United States, supra* [528 F.2d 738, in which case a petition for certiorari, No. 75-1695, is also pending before this Court]. The existence of this conflict has complicated significantly the administration of the variable bonus program, encouraged forum shopping and additional litigation, and raised the possibility that the claims of a substantial number of service members with claims to variable bonuses will be resolved in an inconsistent manner."

(Petition at p. 14).

This case involves the identical issues presented in the *Larionoff* and *Carini* cases, *supra.*

2. This Court should grant certiorari to the court below because the judgment below cannot be reconciled with the decision of this Court in *Lynch v. United States,* 292 U.S. 571 (1934). That case, among others, holds the rights of individuals contracting with the United States are protected by the Fifth Amendment to the Constitution. *Lynch v. United States, supra* at 579; *United States v. Central Pacific Railroad Co.,* 118 U.S. 235, 238 (1886); *The Sinking-Fund Cases,* 99 U.S. 700, 719, 721 (1879). Congressional power to abrogate governmental obligations under such contracts is narrowly circumscribed, and generally is limited to situations involving the exercise of the war power. Where, as here, the action of Congress did not even purport to be an exercise of the war power but was simply an economy move, the right to abrogate the contractual right to the VRB is nonexistent. *Lynch v. United States, supra* at 579. Indeed, Judge Sweigert on the court below intimated in a concurrence that there may be a conflict, but "if we misconstrue ***Bell,*** it will be for the Supreme Court to make the correction." Appendix A at page 8a.

The Court of Appeals below did not discuss or determine the purpose of the congressional repeal of

the VRB. The district courts below, however, were persuaded that the true purpose of the statute was fiscal savings. See Conclusion of Law No. 7, Appendices B & C at page 18a and page 28a. *Accord: Larionoff v. United States, supra,* 533 F.2d 1167, at 1180, noting that "The Department of Defense specifically recommended the 1974 amendments to Congress as 'an opportunity to save money while simultaneously improving our management of reenlistment incentive.' "

3. The contractual rights of petitioners have been violated by the denial of the VRB; principles of contract law were not applied to the contracts here involved; and said contracts were construed and applied in a manner inconsistent with the due process clause of the Fifth Amendment.

a. The "Agreement to Extend Enlistment" recited as consideration the "pay, benefits and allowances which will accrue" to each petitioner. See Finding of Fact No. 6 at Appendices B & C, at page 13a and page 24a.

The standard enlistment contract contains no such language, it merely refers to service "under the conditions provided by law." The most reasonable explanation of the difference in the language is that it arises out of an intent to refer, however indirectly, to the VRB as one of the promised "benefits . . . which will accrue." This language reinforces the basis for the belief by petitioners that if they agreed to re-enlist they would receive the VRB. When the then-existing statutes and regulations providing for the VRB were successfully used by respondent as an inducement leading to the execution of the agreements by petitioners, the said statutes and regulations were incorporated

in the said Agreements. *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 435 (1934). Additionally, the developing military law in this area, in the lower federal courts, has specifically adopted the *Home Bldg.* rationale. *See, e.g., Rehart v. Clark,* 448 F.2d 170, 173 (9th Cir. 1971); *Goldstein v. Clifford,* 290 F. Supp. 275, 279 (D.N.J. 1968); *Pfile v. Corcoran,* 287 F.Supp. 554, 556-57 (D.Colo. 1968); *Peavy v. Warner,* 493 F.2d 748, 750 (5th Cir. 1974); *Crane v. Coleman,* 389 F.Supp. 22 (E.D.Pa. 1975); *Bemis v. Whelan,* 341 F.Supp. 1280 (S.D.Cal. 1972); *Cf.: Monaco v. United States,* 523 F.2d 935, 939 (9th Cir. 1975); *Iliff v. Schlesinger,* ..... F.2d ....., No. 75-1345 (decided August 19, 1976, 10th Cir.).

The instructions given by the Navy for the use of the VRB read in part: "The Variable Reenlistment Bonus, *because of its superior effectiveness as a first term re-enlistment incentive,* will be used as the principal method of obtaining an adequate Career Manning Level in presently undermanned ratings and NEC's" (Emphasis added). Bureau of Personnel Instruction 1133-18E, 23 March 1972, ¶5a; see Appendix E at page 60a.

b. Reliance by the court below upon the dictum in *Bell v. United States,* 366 U.S. 393 (1961) is misplaced. The statement that "a soldier's entitlement to pay is dependent upon statutory right" set forth a general principle which was relevant *to the facts of that case.* In *Bell* there was *no promise* by way of inducement or otherwise to pay the enlistees any specific amounts at any time. Here there was such a promise to pay a bonus in consideration of the agreement to re-enlist. That consideration was delivered

by petitioners (irrevocably the respondent contends) before the law was amended and all of the conditions subsequent required to *complete* the right to payment have now been fulfilled. *Bell* cannot be read to prohibit Congress from authorizing the Military Departments to enter into contracts with service personnel.

This case is no different than one in which a substantial part of the construction of a military installation is performed under a valid contract entered into with the military, providing for payment on completion of the work *required* by the contract. Assume that Congress while the work was in process passed legislation relieving the government of any obligation to make the promised payment, while requiring the contractor to fully perform under the agreement. The government could not escape its obligations there; it should not be permitted to do so here.

c. Moreover, the consideration to the United States for the VRB was not simply the rendition of services for which service pay is the quid pro quo. The VRB was promised in return for the *re-enlistment agreement* which respondents have made *binding* upon petitioners. The right to the bonus, subject of course to certain conditions to be met in the future (as distinguished from the right to payment at that time), came into existence upon the execution of the agreement to re-enlist. The VRB does not constitute payment for services to be rendered in the future as was the pay dealt with in the *Bell* dictum. It was a promise to pay which could be presented for collection when the due date arrived. It came into existence as a property right upon the signing of the re-enlistment agreement. *The Sinking-Fund Cases, supra,* 99 U.S. at 721.

d. The fact that payment of the VRB did not become due at the time of the execution of the agreement and further that certain other preconditions were required prior to payment do not impair the contractual obligations that were created when each agreement to re-enlist was signed. The contract became binding when petitioners executed it. See BUPERSMAN Article 1050150, ¶1.d; see Appendix E at page 78a. Petitioners thus changed their positions to their detriment at that time. Once it did become effective, and petitioners were *bound,* no provision thereof could be set aside by legislative fiat except upon showing of the exercise of a paramount power of Congress. If a contract of employment had been entered into with a private party on the promise of a bonus at a later date if and when certain prescribed conditions had been fulfilled, "property rights" would have come into existence upon execution of the agreement. Likewise the property rights of petitioners, having been created by the re-enlistment contract, could not be unilaterally wiped out by unilateral action of respondent. *Lynch v. United States, supra;* at 579 (1934); *The Sinking-Fund Cases, supra; United States v. Central Pacific Railroad Co., supra.*

e. The Court of Appeals did not disturb, or disagree with the findings of the respective district court judges that petitioners were induced by the Navy to agree to re-enlist in return for payment of the VRB. The Court of Appeals acknowledged that petitioners had understood—and reasonably so—that they would be paid the VRB at the commencement of their extensions of enlistments. All of the elements of a contractual obligation undertaken by respondent are present.

The existence of the bargain for a specified period of extra service, and the reliance upon the expectations reasonably flowing from the statutes, Navy regulations, and specific promises made by respondent to petitioners inducing the execution of re-enlistment agreements establish beyond cavil that the entitlement to VRB is a property right, not a "gratuity" like a pension, retirement pay, or medical services for retirees, none of which are the result of any bargain.

f. The respondent takes inconsistent and irreconcilable positions. On the one hand, it asserts that the agreements to re-enlist constituted an unalterable change of position, *i.e.*, that the agreement to re-enlist fully bound each petitioner. On the other, it argues that a substantial part of the promised consideration which induced that very substantial change of position by the petitioner may be withdrawn at the will of Congress. The contract doctrine of mutuality is ignored. If respondent were to have its way, a new principle of contract law would be required to the effect that the obligation of a contract by a citizen with the United States is binding upon the citizen but not on his government.

g. Unless the statutes involved and each contract between petitioners and respondents are construed and applied in the manner urged by petitioners, serious constitutional questions will arise. It is elementary that if possible, such constitutional questions should be avoided. *Barr v. Matteo,* 355 U.S. 171, 172 (1957); *Eccles v. Peoples Bank,* 333 U.S. 426, 432 (1948); concurring opinion of Brandeis, J., in *Ashwander v. TVA,* 297 U.S. 288, 346-48 (1936); *Crowell v. Benson,* 285 U.S. 22, 62 (1932).

The due process clause of the Fifth Amendment to the Constitution of the United States applies to contracts between the United States and private parties. Thus, the United States may not negate its contractual obligations by legislative repeal of the statute which authorized the contract at the time of its execution, for this would constitute a violation of the Fifth Amendment's prohibition against a taking of property without due process of law. *Lynch v. United States, supra; The Sinking-Fund Cases, supra; United States v. Central Pacific Railroad Co., supra.*

h. In addition, the due process requirements of the Fifth Amendment of the Constitution bar "Congress from enactments that shock the sense of fair play—which is the essence of due process." *Galvan v. Press,* 347 U.S. 522, 530 (1954); see also *United States v. Purcell Envelope Co.,* 249 U.S. 313, 319 (1919); *United States v. Utah, Nevada and California Stage Co.,* 199 U.S. 414 (1904).

The legislation authorizing the VRB was enacted in 1965. Its specific purpose, as stated by Congress, was "to enable the departments to provide a strong re-enlistment incentive to first term enlisted personnel whose skills are critically required by the military department." U.S. Code Cong. and Admin. News, 89th Cong., 1st Sess. at 2756. The Navy utilized the legislation for its intended purpose when it induced the petitioners to re-enlist upon the promise of a VRB. There is no dissent in any of the courts—trial or appellate—that have considered the issue from the view that petitioners reasonably relied on the promises thus made.

Then, the promises having achieved their objectives, as declared by both the Congress and the Navy, it is now urged that the promises of Congress and the Navy need not be kept! Entirely aside from the breach

of contract involved, it is difficult to conceive of any governmental action more fundamentally unfair. If the respondent prevails in depriving petitioners of the promised VRB, the effect, regardless of intent, is a fraud on the petitioners. It is hardly an exaggeration to say that such a result raised serious questions under the fairness requirements of the Fifth Amendment's due process clause. The statutes involved and the re-enlistment contracts should be construed in a manner that avoids this result, as they were in the district courts.

i. The foregoing construction of the contract is also required by the fact that the petitioners' re-enlistment contract is obviously an adhesion contract. It is a printed form contract which was drafted solely by the United States Government, clearly the party in the superior bargaining position, with petitioners' sole alternative being either to accept or reject it. Finding of Fact No. 3; see, Appendices B & C at p. 13a & p. 24a. See also Appendix D at pp. 38a-39a. See also BUPERSMAN Article 1050150, ¶1.a, Appendix E at page 77a.

Contracts of adhesion are to be construed strictly against the drafters. *Semmes Motors Inc. v. Ford Motor Company, supra,* 429 F.2d 1197 (2nd Cir. 1970); *Osborn v. Boeing Airplane Company, supra,* 309 F.2d 99 (9th Cir. 1962); *Hodgins v. American Mutual Liability Insurance Company, supra,* 261 F.Supp. 129 (D.E.D. Penn. 1966); *Shay v. Agricultural Stab. Conserv. State Com. For Ariz.,* 299 F.2d 516, 517 (9th Cir. 1962); *Chandler v. Aero Mayflower Transit Company,* 374 F.2d 129 (4th Cir. 1967).

j. The respondent is obligated to pay to appellees the consideration required because of the execution

of the re-enlistment contract. The respondent would be authorized to refuse to pay the amount promised to the appellees only if specific provisions in the contract permitted it. Thus, *compare Anderson v. United States,* 123 F.2d 13 (9th Cir. 1941) where the contract anticipated future changes *with Penker Construction Company v. United States,* 96 Ct. Cl. 1 (1942) where the contract did not so provide.

4. For the following reasons the government is estopped from denying petitioners the VRB that the government promised them:

a. Although he disagreed with their contractual claims, even Judge Haynsworth found, in *Carini,* below, as apparently was the conclusion of all the lower courts that considered the questions, that petitioners' arguments were "most appealing" from a moral point of view, stating that they were induced by respondent to sign the re-enlistment agreements on the promise of the VRB and that, despite his holding against petitioners, "*they could not be charged* with anticipation that the Congress would so change the statute as to make them unqualified for any special bonus without an extension of their re-enlistment agreements for an additional two-year period, . . ." *Carini v. United States,* 528 F.2d 738, 741-742 (4th Cir. 1975) (emphasis supplied).

Despite the foregoing no consideration was given in the *Carini* opinion to the issue of estoppel. Likewise the Court of Appeals below began *its* opinion by remarking: "These are cases in which the not unreasonable expectations of the plaintiffs must be disappointed. . . ."
Appendix A at page 1a.

b. The attempt by the United States Navy to renege on the payment of VRBs (conceded by the court

below to have been "reasonably expected" by petitioners) has sparked several dozen lawsuits. According to proceedings before the Judicial Panel on Multi-District Litigation in *In Re U.S. Navy Variable Re-enlistment Bonus Litigation, supra,* approximately two dozen cases had then been filed on behalf of various groups of individual plaintiffs in ten different district courts in addition to the present case, including *Wood v. United States,* Civil No. 75-328-N (S.D. Cal. filed July 8, 1975), a class action on behalf of approximately 30,000 enlisted men. *See also* the Solicitor General's Petition for a Writ of Certiorari in *Larionoff, supra,* No. 76-413, at pp. 18-19, n. 20.

The government conduct, precisely because of its lack of fairness, strikes at the core of the ability of the United States to recruit sufficient personnel to sustain an all-volunteer military force. *See* Note, *Armed Forces Enlistment: The Use and Abuse of Contract,* 39 U.Chi. L.Rev. 783, 804-7 (1972):

> ". . . to the extent that the government depends on the voluntary action of its citizens, rather than compulsion, to carry out its functions, such as the raising of armies, citizens must be able to rely on the promises that the government has made to induce them to act. . . .
>
> ". . . The emphasis given such guarantees in the armed forces' recruiting campaigns indicates that they are 'bargained for and given in exchange' for voluntary enlistment, and it can be assumed that the military would not offer a particular guarantee to an enlistee unless it was necessary to induce his enlistment. . . ."

And cf. Reamer v. United States, 532 F.2d 349, 352 (4th Cir. 1976) (Craven, J., dissenting).

c. The undesirable and inequitable results discussed above may be avoided by the application of the doctrine of promissory estoppel.

The estoppel doctrine is applicable to the United States government where justice and fair play require it. *Moser v. United States,* 341 U.S. 41 (1951) 795 L.Ed 729; *United States v. Georgia-Pacific Company* (9th Cir. 1970); *United States v. Lazy F.C. Ranch,* 481 F.2d 985 (9th Cir. 1973); *Fox v. Morton,* 505 F.2d 254 (9th Cir. 1974); *United States v. Wharton,* 514 F.2d 406 (9th Cir. 1975).

The elements bringing into effect the promissory estoppel doctrine are that:

(1) A definite promise be made by a party with reasonable expectation that it will induce action or forbearance on the part of the promisee; and

(2) The promise induces such action or forbearance by the promisee in justifiable reliance on the promise, to the promisee's detriment; and

(3) Injustice can be avoided only by enforcement of the promise.

Clearly all of the aforesaid elements are present in this case.

5. If petitioners are not entitled to money damages, they are entitled to *habeas corpus* relief and release from military control because of the failure of the government to pay the monetary consideration that was reasonably relied upon as an inducement for agreeing to enlist for an extra period of duty.

The Court of Appeals agreed that the petitioners had reasonably expected to receive the VRB mandated by statute at the time they incurred their ob-

ligation to re-enlist. If the courts for any reason are without power to order payment of a VRB (a dubious proposition, as argued *supra*), certainly the courts do have the power to relieve the petitioners of their purported obligations to serve the extended terms of enlistment. *Cf., e.g., Peavy v. Warner,* 493 F.2d 748 (5th Cir. 1974); *Shelton v. Brunson,* 465 F.2d 144 (5th Cir. 1972). As Judge Kellam noted in the district court opinion in *Carini, supra*:

> "While Congress, in *Brooks v.* [*United States,* 33 F. 68 (E.D. N.Y. 1939)], did abolish the reenlistment bonus, it did not require anyone to serve a term of re-enlistment without a bonus."

Certainly this Court should not sanction the result that the petitioners must serve their re-enlistment without receiving the principal consideration they reasonably expected for that re-enlistment.[8]

Conclusion.

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

[8]For many of petitioners, the delays of appellate litigation will have rendered the relief of *habeas corpus* phyrric or nugatory.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Earl B. Collins, et al., *Plaintiffs-Appellees and Cross-Appellants,* vs. Donald H. Rumsfeld, et al., *Defendants-Appellants and Cross-Appellees.* Nos. 75-2935, 75-2967; and other consolidated cases Nos. 75-3238, 75-3432, 75-3348, 75-3559.

[September 27, 1976].

On Appeals from the United States District Court for the District of Hawaii; the United States District Court for the Southern District of California; and the United States District Court for the Central District of California.

Before: CHAMBERS and SNEED, Circuit Judges, and SWEIGERT,* District Judge.

SNEED, Circuit Judge:

These are cases in which the not unreasonable expectations of the plaintiffs must be disappointed in order to serve the common good as perceived by Congress. This provides little comfort to the plaintiffs who are enlisted naval personnel, but our recognition of this perception of Congress extinguishes any power on our part to intervene.

In brief, the cases amount to this. The plaintiffs, while on active duty in the Navy, entered into agreements to extend their enlistments for an additional

*The Honorable William T. Sweigert, Senior United States District Judge for the Northern District of California, sitting by designation.

two or three years, which additional terms were to commence on various dates, all subsequent to June 1, 1974, the effective date of the Armed Forces Enlisted Personnel Bonus Revision Act of 1974.[1] At the time these agreements to extend enlistments were executed the law and applicable regulations authorized the payment of certain bonuses designated as Variable Reenlistment Bonuses (VRB's). Each plaintiff was induced to agree to extend his enlistment by the prospect of receiving in due course a VRB. Prior to the commencement of a period of extended enlistment with respect to any plaintiff, the applicable law was changed by the Bonus Revision Act of 1974. Each of the plaintiffs, either before or after the effective date of the 1974 Act, completed the training which was necessary to qualify for a VRB. The 1974 Act abolished the VRB's and substituted therefor Selective Reenlistment Bonuses (SRB's) for which each plaintiff might qualify but for which he was not then, nor has he become, qualified. The plaintiffs contend that notwithstanding the 1974 Act they are entitled to VRB's upon qualification therefor and commencement of their reenlistment periods. We hold to the contrary and reverse the holdings of the trial courts.

I.

To justify our holding we turn to the agreements to extend enlistments executed by the plaintiffs. Each agreed to extend his enlistment "in consideration of the pay, allowances, and benefits which will *accrue* to me during the continuances of my service." (*Italics* added). No one contends that entitlement to a VRB

[1]Pub. L. No. 93-277, 88 Stat. 119 (*codified in part at* 37 U.S.C. §§ 308, 308a (Supp. IV, 1974)).

accrued at the time the reenlistment agreement was executed. This is acknowledged even though each trial court found that the plaintiffs were induced to extend their enlistments because of the prospect of VRB's. Moreover, this acknowledgment is considered compatible with the fact that the Navy during the time VRB's were available used the program to induce the reenlistment of personnel having "critical skills" and instructed its personnel concerned with obtaining extensions of enlistments to stress the advantages of early reenlistments.

This recognition that an entitlement to a VRB did not *accrue* on execution of the reenlistment agreement is consistent with the applicable legislative history of the 1974 Act. In the deliberations leading to that Act the Navy expressed "great concern" that the bill "might be interpreted to require it to abrogate an understanding it had with enlistees." Conf. Rep. No. 93-985, 93d Cong., 2d Sess. 4 (1974). The Conference Report contains this response to the Navy's concern:

> The Navy expressed great concern that the language of the bill might be interpreted to require it to abrogate an understanding it had with enlistees and would operate in such a way as to cause serious retention problems in its most critical career field. The conferees, therefore, want it understood that while it normally does not expect bonuses to be paid for services for which there was an existing obligation, it is consistent with the conferees' understanding that full entitlement to SRB will be authorized for personnel who have already agreed to an extension period prior to the enactment of the legislation if they subsequently cancel this extension prior to its becoming

> operative and reenlist for a period of at least two years beyond the period of the cancelled extension. Nothing in the bill should operate to deny the Chief of Naval Operations the authority to extend SRB entitlement to nuclear-power operators, if they subsequently can cancel any outstanding extension period prior to its becoming operative and reenlist for a period of at least two years beyond the period of the cancelled extension.

The above "understanding" of the conferees is completely at odds with the notion that the enlistees about whom the Navy was concerned already has accrued rights to VRB's. Such enlistees, among whom are the plaintiffs, were extended an opportunity to qualify for SRB's but not VRB's.

Had Congress intended to maintain that opportunity VRB's would have been treated similar to Regular Reenlistment Bonuses (RRB's) which were preserved for every enlisted member on active duty on the effective date of the 1974 Act. This preservation was provided to prevent those entitled from "losing their $2,000 reenlistment entitlement which by law they expected to receive." H. Rep. No. 93-857, 93d Cong., 2d Sess. 6 (1974). No comparable provision applicable to VRB's was enacted.

II.

Having held that entitlement to a VRB did not accrue on the date an agreement to extend an enlistment was executed, we confront the issue whether Congress immediately thereafter had the power to alter, or abolish entirely, the VRB. We believe it did because bonuses are a form of pay entitlement to which, in the words

of *Bell v. United States,* 366 U.S. 393, 401 (1961), "is dependent upon statutory right" and not "common law rules governing private contracts." When the statute upon which the right to an unaccrued bonus rests is altered, any right to such bonus is also altered. We construe *Carini v. United States,* 528 F.2d 738 (4th Cir. 1975) to so hold and we agree.

The appeal of the plaintiffs' cases lies in the fact that Congress deferred abolishing the VRB's for a significant period of time following the execution of the reenlistment agreements. Expectations aged and, to the reenlistees, became no less than practical certainties. Nonetheless, entitlement thereto remained a "statutory right" subject to Congress' power to alter or abolish.

It may well be that, upon accrual of the right to a VRB, the power of Congress to alter or abolish is more limited. *See Lynch v. United States,* 292 U.S. 571, 577 (1934).[2] Such an issue, however, is not before us because we are convinced, and so hold, that at no time prior to commencement of the reenlistment period did a right to VRB's accrue.[3]

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[2]Impairment of existing contract rights, it has been said, requires the exercise of a paramount governmental power such as the War Power. *See* Larionoff v. United States, ... F.2d .... (D.C. Cir. 1976); Federal Housing Administration v. Darlington, 358 U.S. 84, 97-98 (Harlan dissenting) (1958).

[3]It is not necessary for the disposition of this case to determine the precise point in time at which a right to a VRB might have accrued. There is, however, considerable support in 37 U.S.C. § 308(e), as it existed prior to the 1974 Act, as well as the 1974 Act and its legislative history, for the view that the right to a VRB accrued only as it is earned during the reenlistment period. *See* 37 U.S.C. § 308a(b); H. Rep. No. 93-857, 93d Cong., 2d Sess. 7 (1974). The statutory provisions make clear that the reenlistee who voluntarily or because of misconduct did not complete his reenlistment

(This footnote is continued on next page)

The reenlistment agreements clearly contemplated the possibility of pay, allowances and benefits being altered during either the enlistment or reenlistment periods. The words "which will accrue to me during the continuances of my service" focus on the future and are inconsistent, at least in flavor, with the view that the agreements incorporated and made a part thereof the entire statutory and regulatory provisions pertaining to VRB's as they existed on the date such agreements were executed. It is unlikely the plaintiffs would differ with this had Congress increased the value of VRB's to which they might become entitled rather than abolishing them.

We express no opinion on the manner in which a VRB should be computed had the plaintiffs entered upon their reenlistment period prior to June 1, 1974, the effective date of the 1974 Act. This issue confronted the court in *Larionoff v. United States,* ..... F.2d ..... (D.C. Cir. 1976). We recognize, of course, that the court in *Larionoff* also held that a reenlistee who entered upon his reenlistment period subsequent to the effective date of the 1974 Act was entitled to a VRB. As already indicated we disagree with that holding and, in so doing, align ourselves with *Carini v. United States, supra.*

REVERSED.

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period was obligated to return "that percentage of his bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid." Accrual for the purposes of determining entitlement may proceed differently, however.

Of possible assistance in determining the point in time at which accrual occurs are the cases applying 10 U.S.C. § 857(a) in which is drawn a distinction between accrued and unaccrued pay and allowances for purposes of forfeitures imposed as a result of a court-martial. Forfeiture of accrued pay and allowances is not permitted. *See* Dickenson v. United States, 163 Ct.Cl. 512 (1963).

Judge Sweigert concurring:

I concur with Judge Sneed's result mainly upon the ground set forth in Part II of his opinion.

In *Bell v. United States,* 366 U.S. 393 (1961), the Supreme Court pointed out that "[C]ommon law rules governing private contracts have no place in the area of military pay . . . [a] soldier's entitlement to pay is dependent upon statutory right." (Id. at 401). Quoting from *In re Grimley,* 137 U.S. 147, 151 (1890), the Supreme Court in *Bell* explained that this is so because, although enlistment is a contract, "[I]t is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes" (366 U.S. at 402)—a drastic rule but one that may be justified by national defense considerations affecting the unique relationship between soldiers and their government.

In *Carini v. United States,* 528 F.2d 738 (4th Cir. 1975), the Fourth Circuit pointed out that even the plaintiffs before it conceded that the monthly salary they received was not fixed at the rates in effect at the time of the enlistment contracts and concluded from the above-quoted language of *Bell* that an enlistee's monthly salary is "subject to the unfettered control of the Congress". (Id. at 401).

In *Larionoff v. United States,* 533 F.2d 1167 (4th Cir. February 17, 1976), petition for rehearing denied, 533 F.2d 1188 (April 21, and 29, 1976), the D.C. Circuit, referring to the government's contention that enlistment documents must be construed to incorporate, not only the statutes in force at the time the agreement is signed, but future changes in those statutes as well,

stated that "[T]he government's point is certainly accurate as to regular pay for enlistees . . ." (Id. at 1190), indicating, as I read their opinion, a concession that regular pay of enlistees could be changed (up or down or, for that matter, abolished) by Congress during the enlistment term without releasing the soldier from his obligation to complete the terms.

If it be the law that even a soldier's basic pay is subject to change or even elimination without changing his status as a soldier, then I have no difficulty in agreeing with the Fourth Circuit in *Carini* that special incentive pay in the form of a variable reenlistment bonus, which falls well within the definition of pay as broadly defined in 37 U.S.C. 101 (21), is no less subject to the same drastic Congressional control during the term of enlistment than is regular pay.

If we misconstrue *Bell*, it will be for the Supreme Court to make the correction.

The only Supreme Court case cited to the contrary of *Bell* and *Carini*, is *Lynch v. United States*, 292 U.S. 571 (1934). The difficulty with the citation of *Lynch* is that *Lynch* involved, not army enlistments, but war risk insurance policies under a 1917 Act which had been repealed by the Congress in 1933. The Supreme Court specifically distinguished such insurance policies from pensions and compensation allowances which are gratuities creating no vested right. (292 U.S. at 597).

If the basic law governing army enlistment pay is as stated in *Bell* and *Carini*, it follows that statutory reduction or abrogation of the variable reenlistment bonus here involved was something that reenlistment soldiers must be held to have anticipated during their

enlistment period—however mistaken and disappointed their expectations.

In this view of the applicable law, the actual language of the reenlistment contract is not determinative of the issue presented. However, even that language (as Judge Sneed points out) does not militate against the conclusions I reach mainly upon another ground.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Earl B. Collins, et al., *Plaintiffs-Appellees and Cross-Appellants,* v. Donald H. Rumsfeld, et al., *Defendants-Appellants and Cross-Appellees.* Nos. 75-2935, 75-2967; and other consolidated cases. Nos. 75-3238, 75-3432, 75-3348, 75-3559.

[April 26, 1976]

On Appeals from the United States District Court for the District of Hawaii; the United States District Court for the Southern District of California; and the United States District Court for the Central District of California.

Before: CHAMBERS and SNEED, Circuit Judges, and SWEIGERT,* District Judge.

One "K" represents the government in the above appeal. He is a man of deep religious faith and must eschew worldly matters and be with his family from sundown on Friday until one hour after sundown on Saturday.

"K," a government attorney in Washington, D.C., informally approached a deputy in our clerk's office some weeks ago, stating his problem and requested

*The Honorable William T. Sweigert, United States Senior District Judge from the Northern District of California, sitting by designation.

that he not be calendared for argument on any Friday so that there would be no conflict for him between church and state. He seems to have given no notice to his opponents of his unilateral approach to the court. I assume this was because he assumed that he was speaking in behalf of his faith instead of himself.

The deputy to whom he talked at least impliedly agreed to take care of him. But, alas, another made up the May calendar. So, there was a slip-up in the calendar in the absence of a written request.

Counsel is now calendared for Friday, May 14, 1976, at 9:30 a.m. If adhered to, he will get home to Silver Spring, Maryland, slightly after sunset.

Our deputy is not of Mr. "K's" faith, but she is a deeply religious person and with that goes respect for another's faith. So, she overlooked, "What about notice?" If the request had been on any other ground, I could testify that our deputy would have required notice to the opponent and that the request be in writing. Most of the complaints on our clerk's office are that the office is too strict.

The government attorney, "K," who didn't bother to give notice, now wants specific performance on his request, just as if there were a consideration for it. And he shows some indignation.

His opponents are even more indignant. How did this happen without notice to them? "If one can get his *day* (under the table), can one also get one's private panel, or even get a unilateral presentation on the merits to the court" they seem to be thinking, but not saying. Private counsel show calendars of their own both before and after May 14 that prevent them from acquiescing in any other nearby date.

Further, we are unable to furnish the same designated panel again for some time.

How do we solve it?

This is it: The court will convene at 7:30 a.m., Friday, May 14, 1976, to permit government counsel to argue his case, get out to the airport, and back to his home in Silver Spring, Maryland, before sunset.

By not complying with our rules, counsel will inconvenience about thirty people with a 7:30 a.m. hearing.

If West Publishing Company, or anyone else, is looking for a headnote on this memorandum today, it is:

> The First Amendment to the Constitution as to the free exercise of religion is not abridged if counsel observes the rule of giving an opponent notice.

The clerk will calendar as indicated above.

[FOR PUBLICATION]

APPENDIX B.

Findings of Fact and Conclusions of Law.

United States District Court, Southern District of California.

Roy W. Aikin, [and Ronny G. Saylors] et al., *Plaintiffs,* v. United States of AMERICA, et al., *Defendants.* Civil No. 75-0062-N.

Plaintiffs' Motion for Summary Judgment having come on regularly before this Court for hearing on June 16, 1975, before the Honorable Leland C. Nielsen, United States District Judge, and with plaintiffs appearing through their counsel, Garfield & Tepper, by Scott J. Tepper, and defendants appearing through their counsel Harry D. Steward, United States Attorney, by Michael E. Quinton, Assistant United States Attorney, and the Court having considered the pleadings, exhibits, and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is a consolidated action by numerous enlisted members of the United States Navy who pray, *inter alia,* that this Court award them money damages under the Tucker Act, 28 U.S.C. § 1346(a)(2) for breach of contract.

2. At the time of the filing of this action, all plaintiffs resided in and/or were assigned and attached to naval installations or vessels located or home-ported in San Diego, California, and within the geographical jurisdiction encompassed by this Court.

3. Between 1970 and 1974 each plaintiff enlisted in the United States Navy for a period of three or four years. At various times soon after commencement

of active duty, each plaintiff was also induced and voluntarily agreed to reenlist in the Navy for an additional two or three years, said reenlistment to commence upon expiration of the original three- or four-year enlistment. Each plaintiff thereupon executed a Navy form known as "Agreement to Extend Enlistment." The "extension" was to become binding on the day on which the "Agreement to Extend Enlistment" form was executed.

4. In the "Agreement to Extend Enlistment" form, at the place where it was printed: "Reason for Extension" there was typed: "Training [either Nuclear Field Program or Advanced Electronics Program or some other area]."

5. At the time the "Agreement to extend Enlistment" forms were executed by plaintiffs herein, 37 U.S.C. § 308(g) (1968), and Department of Defense Directives and Department of the Navy Regulations promulgated thereunder, provided that personnel with "critical skill" designations who voluntarily extended their first term of enlistment for two or three years and began serving their reenlistments were entitled to a Variable Reenlistment Bonus (VRB) worth up to four times the amount of the regular reenlistment bonus (and up to twelve times the amount of each plaintiff's monthly pay on the date on which his or her original enlistment expired).

6. None of the enlistment and reenlistment documents executed by plaintiffs herein contain any *express* reference to VRB. However, each "Agreement to Extend Enlistment" stated that each plaintiff was extending his or her enlistment "in consideration of the pay, allowances and benefits which will accrue to [him or her] during the continuances of [his or her] service."

7. Each plaintiff listed in Schedule 1 of the Judgment herein has completed each and every obligation required of him or her to perform under his original enlistment contract and the "Agreement to Extend Enlistment" in order to maintain his or her eligibility for payment of VRB as required under the Navy's VRB-implementing regulations as they existed as of May 31, 1974; each plaintiff listed on Schedule 2 of the Judgment herein has not yet completed the term of his or her original enlistment contract, but each of those plaintiffs has been complying with each and every obligation required of him or her to perform under the original enlistment contract and the "Agreement to Extend Enlistment" in order to maintain eligibility for payment of VRB as required under the Navy's VRB-implementing regulations as they existed as of May 31, 1974.

8. The reenlistment which each plaintiff agreed to undertake is a reenlistment for the purposes of a reenlistment bonus in general, and the VRB in particular. The Navy's use of the term "extension of enlistment" is synonymous with the term "reenlistment" for all purposes herein.

9. There was in effect, at the time each plaintiff originally enlisted in the United States Navy, and executed the "Agreement to Extend Enlistment," a federal law which would have permitted the Navy to enlist each plaintiff herein for a period of six consecutive years, without "break," "extension" or "reenlistment." However, in the case of these plaintiffs, the Navy chose not to solicit such enlistments, but chose instead to enlist these plaintiffs for certain, shorter original enlistment terms coupled with a specific additional term of reenlistment. An express purpose of

the Navy's selection of this method of enlistment and reenlistment was to insure that each plaintiff would be entitled to payment of VRB upon commencement of each plaintiff's reenlistment.

10. On June 1 1974, Public Law 93-277 took effect, repealing the then existing provisions of 37 U.S.C. § 308(g) (1968). It is the Navy's position that its statutory authority to pay VRB to otherwise eligible sailors who commenced their initial reenlistments under the VRB program on or after June 1, 1974 was terminated. However, Public Law 93-277 and the amendments worked by the said law do not explicitly *prohibit* payment of VRB to sailors such as plaintiffs herein.

11. Many of the plaintiffs herein have requested that the Department of the Navy rescind, terminate or cancel their "Agreement to Extend Enlistment" documents and discharge them at the end of their original enlistments. The Navy has refused to rescind, terminate or cancel, and has taken the position that while it is not statutorily authorized to pay VRB to these plaintiffs—and will not do so—it also is not required to rescind, terminate or cancel the "Agreement to Extend Enlistment" documents of these plaintiffs—and will not do so. Plaintiffs' consolidated Petitions for Writ of Habeas Corpus are currently before this Court.

12. Each plaintiff is now entitled to be paid, or will become entitled to be paid upon termination of his original enlistment, a "Variable Reenlistment Bonus" equal to eight to twelve times the current monthly salary of each plaintiff—said bonus being listed on Schedule 1 of the Judgment for each respective plaintiff —or four to twelve times the monthly salary on the effective date of the commencement of the reenlist-

ment of each plaintiff—said bonus being listed on Schedule 2 of the Judgment for each respective plaintiff.

13. The Court finds that the factual situation presented by intervening plaintiff Henry D. Ruble, as alleged in his original petition (75-0272-N, prior to intervention in this cause) is virtually identical to the factual situation herein, and the Findings of Fact herein are applicable to said intervening plaintiff.

14. The Court finds further that the factual situation presented by intervening plaintiff Harry I. Scarborough, III, as alleged in his original petition (74-585-N, prior to intervention in this cause) differs materially from the factual situation herein, and the Findings of Fact herein are not applicable to said intervening plaintiff.

CONCLUSIONS OF LAW

1. The Court accepts jurisdiction of this action under 28 U.S.C. § 1346(a)(2); consolidation and joinder of actions and claims is permissible under Rules 18 & 20, F.R. Civ.P. Venue is proper as to all named plaintiffs.

2. "[C]laims that enlistment contracts are invalid or have been breached are decided under traditional notions of contract law." *Peavy v. Warner,* 493 F.2d 748, 750 (5th Cir. 1974). *See also Crane v. Coleman,* 389 F. Supp. 22 (E.D.Pa. 1975); *Bemis v. Whelan,* 341 F. Supp. 1280 (S.D. Cal. 1972).

3. "The enlistment instrument and the statutory law in effect when it was signed constitute the enlistment contract." *Goldstein v. Clifford,* 290 F. Supp. 275, 279 (D.N.J. 1968). *See also Larionoff v. United*

States, 365 F. Supp. 140 (D.D.C. 1973). Likewise, valid regulations promulgated pursuant to statute have "the force and effect of law" and "are read into [enlistment] contracts in order to fix the rights and obligations of the parties." *Rehart v. Clark,* 448 F.2d 170, 173 (9th Cir. 1971). Bureau of Personnel Instruction ("BUPERSINST") 1133.18 *series* is merged into each plaintiff's reenlistment agreement and is a part of the reenlistment contract.

4. "The fact that the enlistee has changed his status means he cannot through breach of the contract throw off this status. But change of status does not invalidate the contractual obligations of either party. . . ." Pfile *v. Corcoran,* 287 F. Supp. 554, 556-57 (D. Colo. 1968).

5. "The right to receive the [Variable Reenlistment Bonus] was an integral part of the contract formed between each plaintiff and the Navy, inasmuch as that was the status of the law on the day each contract was signed." *Collins v. United States,* .... F. Supp. ...., (D. Hawaii, May 29, 1975) (slip op. at p. 4) *Accord: Carini v. United States,* .... F. Supp. .... (E.D. Va. 1975); *Larionoff v. United States,* 365 F. Supp. 140 (D.D.C. 1973).

6. Although "[u]nder certain circumstances the legislature has the power, as an attribute of sovereignty, to enact laws which alter existing contracts, . . . this power to pass laws retroactively affecting contracts is not an unqualified one . . . [It may not be exercised] merely with the aim of cutting Government expenditures . . . ." *Pfile v. Corcoran,* 287 F. Supp. 554, 559 (D. Colo. 1968). This being the case, this Court interprets Public Law 93-277 in such a manner

as to save its constitutionality, and holds that the said Public Law cannot, as a mater of interpretation, abrogate the contractual rights of plaintiffs herein. To read Public Law 93-277 otherwise would render it constitutionally infirm. *See also Lynch v. United States,* 292 U.S. 571 (1934).

7. "Congress' decision to revoke the VRB was prompted by purely fiscal reasons and not by considerations incident to its war powers. Therefore . . . Congress did not possess the authority to alter retroactively the terms of plaintiffs' contracts with the Navy, [and] the VRBs are rightfully owed to plaintiffs and must be paid . . . ." *Collins v. United States,* .... F. Supp. .... (D. Hawaii, May 29, 1975) (slip op. at p. 6).

8. Plaintiffs herein, except for intervenor Harry I. Scarborough III, are entitled, as a matter of law, to summary judgment. *Adams v. United States,* CV74-1585-ALS (motion for summary judgment *granted* June 2, 1975) (C.D. Cal.); *Collins v. United States, supra; Carini v. United States,* .... F. Supp. .... (E.D. Va., 1975). The case of intervenor Scarborough is hereby severed from this action and will be the subject of a separate order at the appropriate time.

9. Plaintiffs are entitled to the money damages relief that they seek. As to those plaintiffs who have commenced reenlistment, a settled order shall be entered awarding each plaintiff money damages equivalent to the Variable Reenlistment Bonus he or she was promised and would have received but for the breach of contract by defendants herein; as to those plaintiffs whose three or four-year terms of original enlistment have not yet expired, appropriate declaratory relief shall be entered. The variable multiplier in effect on

the date on which each respective plaintiff executed the "Agreement to Extend Enlistment" shall be utilized to determine the amount of money damages to which each plaintiff is or will become entitled. *See Carini v. United States,* .... F. Supp. .... (E.D. Va. 1975); *Larionoff v. United States,* 365 F. Supp. 140 (D.D.C. 1973).

10. Plaintiffs have an adequate remedy at law through the award of money damages. Habeas corpus relief, therefore, is not an appropriate form of relief under the circumstances.

11. Any conclusion of law deemed to be a finding of fact, or *vice versa,* shall be appropriately incorporated into the Findings of Fact or Conclusions of Law, as the case may be.

Dated: August 26, 1975.

/s/ Leland C. Nielsen
Leland C. Nielsen
United States District Judge

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Assistant U.S. Attorney

Judgment.

United States District Court, Southern District of California.

Roy W. Aikin, et al., *Plaintiffs,* v. United States of America, et al., *Defendants.* Civil No. 75-0062-N.

Defendants' Motion to Dismiss and cross-motions for Summary Judgment having come regularly before this Court for hearing on June 16, 1975, before the Honorable Leland C. Nielsen District Judge, and with plaintiffs appearing through their counsel, Garfield & Tepper, by Scott J. Tepper, and defendants appearing through their counsel, Harry D. Steward, United States Attorney, by Michael E. Quinton, Assistant United States Attorney, and the Court having thoroughly considered the pleadings, exhibits, affidavits and other papers on file herein, and the issues having been duly heard, and a subsequent hearing having been entertained on August 11, 1975, and a decision having been duly rendered, and based upon the Findings of Fact and Conclusions of Law filed herein.

It Is Ordered as follows:

1. That each plaintiff listed on Schedule 1 attached hereto shall be entitled to the damages set forth after his or her name and which damages are due and payable forthwith;

2. That each plaintiff listed on Schedule 2 attached hereto shall be entitled to damages payable in two equal annual installments (except in the cases of plaintiffs Phillip L. Roussos, Richard G. Steele and Roxanne E. Geoppo, in which cases they shall be entitled to be paid damages in three equal annual installments) which damages shall be payable commencing on the

date set forth eafter each plaintiff's name in column 3 of Schedule 2, and which damages shall be the product of the numbers set forth at column 2 of Schedule 2, multiplied by each plaintiff's monthly basic pay as of the date set forth at column 3 thereof;

3. That plaintiffs' request for habeas corpus relief is denied;

4. That plaintiffs shall be entitled to their costs as proven upon their presentation of a bill of costs, which costs shall be made payable to their attorneys of record, Garfield & Tepper, in the amount of $101.34.

So Ordered.

Dated: August 26, 1975.

/s/ Leland C. Nielsen
Leland C. Nielsen
United States District Judge

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Michael E. Quinton
Assistant U.S. Attorney

[Schedules 1 and 2 omitted herefrom.]

Order Amending Judgment.

United States District Court, Southern District of California.

Roy W. Aikin, et al., *Plaintiffs,* v. United States of America, et al., *Defendants.* Civil No. 75-0062-N.

It Is Hereby Ordered that the Judgment of the Court in the above-captioned matter, entered on August 28, 1975, be amended as follows, in that page two of that Judgment shall be stricken and the attached page inserted in its place.

This Order is made pursuant to the dictates of Federal Rule of Civil Procedure 54(b).

So Ordered.

Dated: October 1, 1975.

/s/ Leland C. Nielsen
Leland C. Nielsen
United States District Judge

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[Page 2 of Schedule 1 omitted herefrom.]

APPENDIX C.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

John C. Adams, Jr., et al., *Plaintiffs,* v. United States of America, *Defendant.* No. CV 74-1585-ALS.

[Filed September 16, 1975, Clerk, U.S. District Court]

Plaintiffs' Motion for Summary Judgment having come on regularly before this court for hearing on June 2, 1975, before the Honorable Albert Lee Stephens, Jr., United States District Judge, and with plaintiffs appearing through their counsel Garfield & Tepper by Scott J. Tepper, Esq., and defendant appearing through its counsel William D. Keller, United States Attorney, by Stephen D. Petersen, Esq., Assistant United States Attorney, and the court having considered the pleadings, exhibits, and arguments of counsel the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is a consolidated action by numerous enlisted members of the United States Navy who request that this court award them money damages under the Tucker Act, 28 U.S.C. § 1346.

2. At the time of the filing of this action, all plaintiffs resided in and were assigned and attached to naval installations or vessels located or home-ported in Long Beach, California, and within the geographical jurisdiction encompassed by this court.

3. Between 1970 and 1973, each plaintiff enlisted in the United States Navy for a period of four years. At various times soon after commencement of active duty, each plaintiff was also induced and voluntarily agreed to reenlist in the Navy for an additional two years, said reenlistment to commence upon expiration of the original four-year enlistment. Each plaintiff thereupon executed a Navy form known as "Agreement to Extend Enlistment." The "extension" was to become binding on the day on which the "Agreement to Extend Enlistment" form was signed.

4. In the "Agreement to Extend Enlistment" form, at the place where it was printed: "Reason for Extension" there was typed, in most cases: "Training [either Nuclear Field Program or Advanced Electronics Program]."

5. At the time the "Agreement to Extend Enlistment" forms were executed by plaintiffs herein, 37 U.S.C. § 308(g) (1968), and Department of Defense Directives and Department of the Navy Regulations promulgated thereunder, provided that personnel with "critical skill" designations who voluntarily extended their first term of enlistment for two years were entitled to a Variable Reenlistment Bonus (VRB) worth up to four times the amount of the regular reenlistment bonus.

6. None of the enlistment and reenlistment documents executed by plaintiffs herein contained any express reference to VRB. However, each "Agreement to Extend Enlistment" stated that each plaintiff was extending his enlistment "in consideration of the pay, allowances and benefits which will accrue to [him] during the continuances of [his] service."

7. Each plaintiff listed on the schedule attached to the Judgment herein who has entered his reenlistment or extension period has completed each and every obligation required of him under his original enlistment contract and the "Agreement to Extend Enlistment" in order to maintain eligibility for payment of a VRB under the Navy's VRB-implementing regulations as they existed on May 31, 1974. Each plaintiff listed on the schedule attached to the Judgment herein who has not yet completed the term of his original enlistment contract has been complying with each and every obligation required of him under his original enlistment contract and the "Agreement to Extend Enlistment" in order to maintain eligibility for payment of a VRB under the Navy's VRB-implementing regulations as they existed on May 31, 1974.

8. The reenlistment which each plaintiff agreed to undertake is a reenlistment for the purposes of a reenlistment bonus in general, and the VRB in particular.

9. There was in effect, at the time each plaintiff originally enlisted in the United States Navy, and executed the "Agreement to Extend Enlistment," federal law which would have permitted the Navy to enlist each plaintiff herein for a period of six consecutive years, without "break," "extension" or "reenlistment." However, in the case of these plaintiffs, the Navy chose not to solicit such enlistments, but chose instead to enlist these plaintiffs for certain, shorter original enlistment terms coupled with a specific additional term of reenlistment. One reason for the selection of this method of enlistment and reenlistment was to enable the plaintiffs to become eligible for the Variable Reenlistment Bonuses.

10. On June 1, 1974, Public Law 93-277 took effect, repealing the then-existing provisions of 37 U.S.C. § 308(g) (1968), and terminating, in the opinion of the Navy, the statutory authority to pay Variable Reenlistment Bonuses to men who commenced their initial enlistments under the VRB program on and after June 1, 1974.

11. Some of the plaintiffs herein have requested that the Department of the Navy rescind their "Agreement to Extend Enlistment" documents and to discharge them at the end of their four-year enlistments. The Navy has refused to rescind and has taken the position that while it is not statutorily authorized to pay VRB to these plaintiffs—and will not do so—it also is not required to rescind the "Agreement to Extend Enlistment" documents of these plaintiffs—and will not do so. On January 27, 1975, this court entered final judgment on plaintiffs' consolidated petitions, denying their requested writs of *habeas corpus* (and ancillary mandamus and declaratory relief).

12. Each plaintiff is now entitled to be paid, or will become entitled to be paid upon termination of his original enlistment, damages equivalent to the Variable Reenlistment Bonus each plaintiff would have received pursuant to the applicable provisions of 37 U.S.C. § 308 as they existed prior to the 1974 amendment. The damages due each plaintiff are to be determined in accordance with paragraph (1)(a) of the Judgment entered herein.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action under 28 U.S.C. § 1346(a)(2); consolidation and joinder of actions is permissible under the Federal Rules of Civil Procedure, F.R.Civ.P. Rule 20. Venue is proper as to the named plaintiffs.

2. "Claims that enlistment contracts have been breached are decided under traditional notions of contract law." *Peavy vs. Warner,* 493 F. 2d 748, 750 (5th Cir. 1974); *Crane vs. Coleman,* 389 F. Supp. 22 (E.D. Pa. 1975).

3. "The enlistment instrument and the statutory law in effect when it was signed constitute the enlistment contract." *Goldstein vs. Clifford,* 290 F. Supp. 275, 279 (D. N.Y. 1968); *see also Larionoff vs. United States,* 365 F. Supp. 140 (D. D.C. 1973). Likewise, valid regulations promulgated pursuant to statute have "the force and effect of laws" and "are read into [enlistment] contracts in order to fix the rights and obligations of the parties." *Rehart vs. Clark,* 448 F. 2d 170, 173 (9th Cir. 1971). Bureau of Personnel Instruction 1133.18 *series* is merged into each plaintiff's reenlistment agreement and is a part of the reenlistment contract.

4. "The fact that the enlistee has changed his status means he cannot through [his own] breach of the contract throw off his status. But change of [his] status does not invalidate the contractual obligations

of either party . . ." *Pfile vs. Corcoran,* 287 F. Supp. 554 (D. Colo. 1968).

5. "[T]he right to receive the VRB [Variable Reenlistment Bonus] was an integral part of the contract formed between each plaintiff and the Navy, inasmuch as that was the status of the law on the day each contract was signed." *Collins vs. United States,* Civil No. 75-0053 (D. Hawaii, May 29, 1975) (slip op. at p. 4). *Accord: Larionoff vs. United States, supra; Carini vs. United States,* No. 74-88-NN (E.D. Va. 1975).

6. Although "under certain circumstances the legislature has the power, as an attribute of sovereignty, to enact laws which alter existing contract . . . this power to pass laws retroactively is not an unqualified one . . . [and may not be exercised] merely with the aim of cutting Government expenditures." *Pfile vs. Corcoran, supra,* at 559; *cf. Lynch vs. United States,* 292 U.S. 571 (1934); *Perry vs. United States,* 294 U.S. 330 (1935). This being the case, this court interprets Public Law 93-277 in such a manner as to save its constitutionality, and holds that the said Public Law, as a matter of interpretation, cannot abrogate the contractual rights of plaintiffs herein.

7. "Congress' decision to revoke the VRB [here] was prompted by purely fiscal reasons and not by considerations incident to its war powers. Therefore . . . Congress did not possess the authority to alter retroactively the terms of plaintiff's contracts with the Navy, [and] the VRB's are rightfully owed to plaintiffs and must be paid." *Collins vs. United States, supra* (slip op. at p. 6).

8. Plaintiffs are entitled, as a matter of law, to summary judgment. *Carini vs. United States, supra; Collins vs. United States, supra.*

9. Plaintiffs are entitled to the relief that they seek. As to those plaintiffs who have commenced reenlistment, a settled order shall be entered awarding each plaintiff money damages equivalent to the Variable Reenlistment Bonus which he was promised, and which he would have been lawfully entitled to receive upon his reenlistment. As to those plaintiffs whose four-year term of original enlistment has not yet expired, appropriate declaratory relief shall be entered. The variable multiplier in effect on the date of each plaintiff's execution of the "Agreement to Extend Enlistment" shall be utilized to determine his VRB in this action. *See Larionoff vs. United States, supra; Carini vs. United States, supra.*

10. Any conclusion of law deemed to be a finding of fact, or *vice versa,* shall be appropriately incorporated into the findings of fact or conclusions of law, as the case may be.

Dated: Sept. 16, 1975.

/s/ Albert L. Stephens, Jr.
Albert L. Stephens, Jr.
Chief United States District Judge

Judgment.

United States District Court, Central District of California.

John C. Adams, Jr., et al., *Plaintiffs,* v. United States of America, *Defendant.* No. CV 74-1585-ALS.

[Filed Sept. 16, 1975. Clerk, U.S. District Court, Central District of California].

Defendant's Motion to Dismiss, and Cross-Motions for Summary Judgment having come regularly before this Court for hearing on June 2, 1975, before the Honorable Albert Lee Stephens, Jr., Chief District Judge, and with Plaintiffs appearing through their counsel, Garfield & Tepper, by Scott J. Tepper, and Defendant appearing through its counsel, William D. Keller, United States Attorney, by Stephen D. Petersen, Assistant United States Attorney, and the Court having thoroughly considered the pleadings, exhibits, affidavits and other papers on file herein, and the issues having been duly heard and the Court having held additional hearings on June 30, 1975 and August 25, 1975, and based upon the Findings of Fact and Conclusions of Law filed herein,

It Is Ordered, Adjudged and Decreed that judgment be and the same is hereby entered in favor of Plaintiffs as follows:

(1)(a) That each Plaintiff listed on the schedules attached hereto shall be entitled to damages equal to twice each Plaintiff's monthly base pay as of the date set forth on the schedules at column 3 after

each Plaintiff's name, multiplied by the factor set forth on the schedules at column 2 after each Plaintiff's name.

Provided, that no Plaintiff who has or will receive a Selective Reenlistment Bonus shall be entitled to damages herein if the period of obligation for which the Selective Reenlistment Bonus was, or is to be, paid includes the period of obligation which has been the subject of this action.

This judgment is without prejudice to, and does not affect, any subsequent claim for recoupment which Defendant may make should any Plaintiff fail to fulfill his enlistment obligation.

(b) Damages shall be payable in the following manner:

In the cases of those Plaintiffs who will have entered the second year of their reenlistment period by the date on which this judgment is entered, or the date on which this judgment is final on appeal, if an appeal is taken herefrom, whichever date is the later, damages shall then be due and payable. As for all other Plaintiffs, their damages shall be payable in two equal annual installments, the first payment to become due on the very next day following the dates set forth on the schedules at column 3 after each such Plaintiff's name, and the second payment to become due one calendar year thereafter.

2. That damage payments shall be paid by Defendant United States of America to the Clerk of this

Court; thereafter, the fund thereby created shall be administered as the Court shall direct so as to effectuate the judgment.

3. That Plaintiffs shall be entitled to their costs in the amount of $97.90.

4. The execution of this judgment is hereby stayed for a period of sixty (60) days, or if an appeal is taken herefrom, during the pendency of such appeal.

Dated this 16th day of September, 1975.

/s/ Albert L. Stephens, Jr.
Chief United States District Judge

Presented by:

Garfield & Tepper
By: /s/ Scott J. Tepper
Scott J. Tepper
Attorneys for Plaintiffs

Approved as to Form:
William D. Keller
United States Attorney
Central District of California

Frederick M. Brosio, Jr.
Assistant U.S. Attorney
Chief, Civil Division
By /s/ Stephen D. Petersen
Stephen D. Petersen
Assistant U.S. Attorney

Attorneys for Defendant

[Schedules omitted herefrom.]

Stipulation to Amend Judgment Nunc Pro Tunc (Rule 60(b)(6) F.R.Civ.P.) and Order Thereon.

United States District Court, Central District of California.

John C. Adams, Jr., et al., *Plaintiffs,* v. United States of America, *Defendant.* No. CV 74-1585-ALS.

It Is Hereby Stipulated by and between the parties, through their respective undersigned counsel, that the Judgment entered herein on September 17, 1975 shall be amended, nunc pro tunc, to that date pursuant to Rule 60(b)(6), F.R.Civ.P., in the following respects:

1. (a) That the plaintiffs whose names are set forth on the attached schedule whom counsel for the parties inadvertently failed to include on their proposed judgments, be included in the Final Judgment of this Court, and that the dates of entitlement and of variable multiplier as set forth on the schedule next to their names accurately reflect their entitlement based upon the Court's Findings Of Fact and Conclusions Of Law filed herein on September 16, 1975.

(b) Defendant however repeats all its prior objections to said Findings Of Fact And Conclusions Of Law and said Judgment as to any plaintiff affected by this stipulation, and defendant does not by this stipulation abandon any prior position in the action nor waive any rights to appellate review of the Court's Amended Judgment. Specifically, but without limitation, defendant contends that, as to the following plaintiffs, the proper variable multiplier should be two, for the reasons expressed in Defendant's Supplemental Memorandum On The Proposed Judgments filed herein on August 20, 1975.

(1) Richard G. Ferranti
(2) Bryan R. Fitzpatrick
(3) Stephen J. Foglio

2. That the complaints of all named plaintiffs whose names are not set forth on the schedule attached to the Judgment entered September 17, 1975, or on the schedule attached hereto, be dismissed forthwith and without prejudice.

DATED: This 4th day of November, 1975.

William D. Keller
United States Attorney
Frederick M. Brosio, Jr.
Assistant U.S. Attorney
Chief, Civil Division
/s/ Stephen D. Petersen
Stephen D. Petersen
Assistant U.S. Attorney
Attorneys for Defendant.

DATED: This 4th day of November, 1975.

Garfield & Tepper
By /s/ Scott J. Tepper
Scott J. Tepper
Attorney at Law
Attorneys for Plaintiffs.

ORDER

It Is So Ordered:

This 11th day of November, 1975.

Albert L. Stephens, Jr.
Chief United States District Judge

[Schedule omitted herefrom.]

APPENDIX D

Memorandum Decision.

In the United States District Court, for the District of Hawaii.

Earl B. Collins, et al., *Plaintiffs*, vs. James R. Schlesinger, et al., *Defendants*. Civil No. 75-0053.

I. *Introduction*

On February 25, 1975, plaintiffs filed this civil action against the Secretary of Defense, the Secretary of the Navy, and various Naval officers, seeking a declaratory judgment, monetary damages, and habeas corpus relief based on the government's alleged failure to fulfill the terms of their enlistment contracts. At the March 10, 1975 hearing on an Order to Show Cause, this court ruled that plaintiffs' application for release from the Navy on a writ of habeas corpus, as set forth in the First Cause of Action in their Verified Petition and Complaint, was inappropriate in this case.

Plaintiffs subsequently filed on April 16, 1975, a motion for summary judgment on their Second Cause of Action for monetary damages. In response, the government filed a motion to dismiss, or in the alternative, for summary judgment. This decision enlarges upon the oral decision for the plaintiffs, rendered by this court at the April 29, 1975 hearing on the motions.

II. *Background Facts*

Between 1970 and 1972, each of the plaintiffs enlisted for four years of active duty in the Navy. Either concurrently with enlistment or shortly thereafter, each plaintiff signed an "Agreement to Extend Enlistment"

for two additional years.[1] The extension took effect, *i.e.*, became binding, on the day the agreement was signed. Each plaintiff thus became obligated for six years of Naval service.

In the Agreement to Extend Enlistment, at the place where it was printed: "Reason for Extension", there was typed, in most cases: "Training (Nuclear Field Program—BUPERS INST 1306.64 series) * * *."

At the time the extension agreements were signed, 37 USC 308(g) (1968), and the Department of Defense and Department of the Navy regulations promulgated thereunder, provided that personnel with a "critical skill" designation who voluntarily extended their first term of enlistment for two years were entitled to a Variable Reenlistment Bonus (VRB) worth up to four times the amount of the regular reenlistment bonus. The VRB was payable in two equal installments in each year of the extension period.

None of the enlistment and reenlistment documents executed by the plaintiffs contained any express reference to a VRB. However, each Agreement to Extend Enlistment stated that each plaintiff was extending his enlistment "in consideration of the pay, allowances, and benefits which will accrue to [him] during the continuances of [his] service * * *."

On May 10, 1974, the President signed into law, Public Law 93-277 which amended 37 U.S.C. 308 et seq. and repealed the Navy's authority to pay the VRB after June 1, 1974. Under the old version of Section 308 plaintiffs would have received between $4,000 and $6,000 for their two-year extension of

[1]Plaintiff Douglas Mulder signed a four year enlistment contract with provisions of one and two year extensions.

service. Section 308, as amended, now authorizes a Selective Reenlistment Bonus (SRB) which is far less than the $4,000 to $6,000 amounts which plaintiffs claim they are entitled to receive for their extension of service.

III. *Legal Issues*

In moving for summary judgment plaintiffs contend that *Carini v. United States,* No. 74-NN (E.D. Va., February 3, 1975), and *Larionoff v. United States,* 365 F. Supp. 140 (1973), should be deemed controlling. In response, and in support of its motion to dismiss, or in the alternative, for summary judgment, the government has posited four basic arguments.

The government first argues that plaintiffs' action is barred by the doctrine of sovereign immunity. This court, however, finds the issue well-settled that this action may be maintained under the Tucker Act, 23 U.S.C. 1346(a)(2). *Carini, supra,* and *Larionoff, supra* at 144.[2]

The government's second argument is that the VRB was not a part of the consideration for plaintiffs' agreements to extend enlistment. The government main-

[2]The Tucker Act gives the District Courts original jurisdiction, concurrent with the Court of Claims, over any claim against the United States not exceeding $10,000 in amount, founded upon any express or implied contract with the United States. In 1954 Congress amended Section 1346(d)(2) to delete the provision which heretofore prohibited district courts from hearing claims or civil actions to recover fees, salary, or compensation for official services of officers or employees of the United States. In this action to recover reenlistment bonuses, which the plaintiffs maintain is included in the consideration—pay, allowances, and benefits—delineated in their reenlistment contracts, this court concludes that plaintiffs have made a prima facie case that this action is founded upon a contract for compensation between the United States and its employees.

tains that according to the plain terms of the contract, what the Navy agreed to provide in exchange for plaintiffs' extensions was special training which qualified plaintiffs to receive pay in accordance with their rank and training, and also provided them with a very attractive skill which would later place them in great demand in the civilian community.

From the specific words of the contract there can be no doubt that the special training was an important part of the bargained-for consideration. However, the absence of any express reference to the VRB in the reenlistment contract is not conclusive on the real issue of whether both the Navy and the enlistees intended the VRB to be included in the "pay, allowances, and benefits" that was expressly bargained for in the contract.

The government cannot deny that the VRB was a mainstay feature in the Navy's reenlistment program. In testimony before Congress on the proposed revision of the VRB program, Lt. General Leo L. Benade, Deputy Assistant Secretary of Defense, Military Personnel Policy, admitted that "the record shows clearly that it [the VRB] has been *our most effective retention feature* * * *." (Emphasis added.) Hearings on S. 2770 and S. 2771 Before the Senate Committee on Armed Services, 93rd Congress, 1st Session, p. 22 (1973). This court further notes that at the time plaintiffs executed their reenlistment contracts the statutory definition of "pay" included the VRB as a form of "special pay." See 37 U.S.C. 101(21) and 308. If the government had intended to exclude the VRB as part of the bargained-for "pay, allowances, and benefits", it could have drafted a specific exclusion in the contract. Here must be applied the elemental

rule that a contract must be construed most strongly against its author, which, in this case, was the government. *Larionoff, supra* at 146.

Based on these considerations, this court finds that although 37 U.S.C. 308 (1968) was not specifically referred to in the extension agreement form, it was a part of that agreement by operation of law. *Carini, supra* at 3-4; *Larionoff, supra at* 145. See *Rehart v. Clark,* 448 F.2d 170 (9th Cir. 1970). Therefore, the right to receive the VRB was an integral part of the contract formed between each plaintiff and the Navy, inasmuch as that was the status of the law on the day each contract was signed.

The government's third argument is that the VRB was not part of the statutory pay which servicemen automatically became entitled to receive upon reenlisting. Here the government emphasizes the phrase "may be paid" in maintaining that the statutory purpose of 37 U.S.C. 303(g) was to provide the Navy with a flexible program for attracting and retaining adequate numbers of highly qualified personnel as careerist shortages in critical skill classifications developed. Given this statutory purpose, the government contends that plaintiffs' eligibility to receive the VRB attached not when the extension agreements were actually signed, but only when the plaintiffs actually began serving the extension and only if they had a rating or Navy Enlistment Code (NEC) then currently designated as critical.

This court cannot concur with this loose reading of 37 U.S.C. 308(g) (1968) by which the Navy now seeks to dishonor its contractual obligation to pay the VRB after plaintiffs had been baited thereby

into signing on for reenlistment. As Judge Richey found in *Larionoff*:

> The VRB was intended to induce first term reenlistment among those with such classified skills to insure the Navy maintained an adequate number of personnel in these areas. *At the time the Plaintiffs signed their reenlistment contracts, the Navy was paying the VRB for this purpose. The Navy was thus benefiting from a guaranteed supply of personnel in critical areas.* The Plaintiffs committed themselves to a total of six years in one of these critical skills which was receiving the VRB. *If the Plaintiffs were bound to the reenlistment contract from the moment of its execution, then mutuality of agreement requires that the Defendants be likewise bound.* (Emphasis added.)
>
> The cardinal rule of contract law that comes into play when analyzing the language of a written instrument is that the document must be considered in light of the situation and relationship of the parties, the circumstances surrounding them *at the time of the contract,* and the nature of the subject-matter and the apparent purpose of the contract. (Citations omitted.) 365 F.Supp. at 145.

Applying this rule to the facts in the instant case, this court finds that plaintiffs' "eligibility" for receiving the VRB's attached or vested upon the execution of the extension agreements. This court also finds that those requirements affecting plaintiffs' qualifications for receiving payment of the VRB in the reenlistment period—*e.g.*, training and conduct record—were conditions subsequent and not conditions precedent for establishing plaintiffs' entitlement to the VRB.

The government's last argument is that plaintiffs' contractual rights to the VRB were subject to Congress' plenary power to change the pay, allowances, and benefits of servicemen. The government contends that in the area of military pay common law rules governing private contracts have no application because a serviceman's entitlement to pay is dependent upon a statutory right, which in this case was changed in the 1974 revision of Section 308.

With respect to Congress' power to make *retroactive* changes in the terms of servicemen's contracts, this court agrees with Judge Kellam's well-reasoned analysis in *Carini* of Congress' limited authority to make such changes. After examining the legislative background for the 1974 revision of Section 308 and the government's moving papers and documents submitted in the instant case, this court finds that Congress' decision to revoke the VRB was prompted by purely fiscal reasons and not by considerations incident to its war powers. Therefore, this court holds that Congress did not possess the authority to alter retroactively the terms of plaintiffs' contracts with the Navy, that the VRB's are rightfully owed to plaintiffs and must be paid, as hereinafter ordered.

Plaintiffs' motion for summary judgment is hereby Granted, and the government's motion to dismiss, or in the alternative, for summary judgment is hereby Denied.

The record shows that at the time each plaintiff entered into a contract for reenlistment he was entitled

to receive a VRB computed by that method set out in Department of Defense Military Pay and Allowances Entitlements Manual, Part I, Chapter 9. For those plaintiffs who began serving their reenlistment after June 1, 1974, as well as those who have not yet begun serving their reenlistment to date, the multiple to be used in computing their VRB shall be the last effective VRB multiple assigned to their respective NECs prior to June 1, 1974. This court believes that this method of computation most fully and fairly comports with the Navy's custom and usage in administering the VRB program and the plaintiffs' understanding, at the time they executed their extension agreements, of how the VRB multiple would be determined.

Because of pending factual questions concerning the eligibility of Roland C. Vetter, Donald E. Emel, Louis G. Leonard, and Douglas E. Mulder, the cases of these plaintiffs are hereby severed and will be the subject of a separate order.

Plaintiffs are entitled to receive their costs, as filed herein, in the amount of $243.00.

Dated: Honolulu, Hawaii, this 29th day of May, 1975.

/s/ Martin Pence
Martin Pence
United States District Judge

Memorandum Decision and Amended Judgment.

In the United States District Court, for the District of Hawaii.

Earl B. Collins, et al., *Plaintiffs,* v. James R. Schlesinger, et al., *Defendants.* Civil No. 75-0053.

On May 29, 1975, this court issued a decision and subsequently entered a Judgment on June 9, 1975, on behalf of plaintiffs, granting plaintiffs' Motion for Summary Judgment and denying the government's Motion to Dismiss, or in the Alternative, For Summary Judgment. Thereafter, plaintiffs filed a Motion for Relief from Judgment on August 8, 1975, maintaining that the multiple used in computing the VRB of the respective plaintiffs should be the multiple in effect at the time of a plaintiff's enlistment.

At the hearing of October 10, 1975, on this motion for relief, this court was convinced that each of the plaintiffs had been led to believe that they would receive, upon reenlistment, the multiple in effect at the time each executed his extension agreement. The evidence indicated that if the multiple were to be the VRB multiple in effect at the time they began serving their reenlistment, some would receive no VRB at all. The "carrot" would be completely removed and only the "stick" would remain. This result certainly could never have been contemplated by the contracting parties at the time the extension agreements were signed.

Plaintiffs' Motion for Relief is Granted, and that portion of this court's Memorandum Decision of May

29, 1975, beginning with line 30 on page 6 thereof, and ending on line 12 on page 7, is hereby amended to read as follows:

"The record shows that at the time each plaintiff entered into a contract for reenlistment he was entitled to receive a VRB computed by that method set out in Department of Defense Military Pay and Allowances Entitlements Manual, Part I, Chapter 9. For those plaintiffs who began serving their reenlistment after June 1, 1974, as well as those who have not yet begun serving their reenlistment to date, the multiple to be used in computing their VRB shall be the multiple in effect on the date that each plaintiff executed his extension of reenlistment agreement. This court believes that this method of computation most fully and fairly comports with the Navy's representations and the plaintiffs' understanding, at the time they executed their respective extension agreements, of how the VRB multiple would be determined." All other portions of the Memorandum Decision of May 29, 1975, remain unchanged.

It Is Adjudged Therefore that the Memorandum Decision dated May 29, 1975, be and hereby is amended to conform to this Memorandum Decision.

Dated: Honolulu, Hawaii, December 9, 1975.

/s/ Martin Pence
Martin Pence
United States District Judge

APPENDIX E

Constitutional, Statutory and Regulatory Provisions Involved.

Constitution.

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Statutes.

The Act of September 7, 1962,
Pub. L. No. 87-649, 76 Stat. 467
[formerly 37 U.S.C. 307(a) through (f)]:

(a) Subject to subsections (b) and (c) of this section, a member of a uniformed service who reenlists in a regular component of the service concerned within three months after the date of his discharge or release from compulsory or voluntary active duty (other than for training), or who voluntarily extends his enlistment for at least two years, and who is not covered by section 207 of the Career Compensation Act of 1949, as amended (70 Stat. 338), is entitled to a bonus computed as follows:

Reenlistment involved[1]	Column 1 Take—	Column 2 Multiply by—
First	Monthly basic pay to which member was entitled at the time of discharge or release.[2]	Number of years specified in reenlistment contract, or six, if none specified.[3]
Second	Two-thirds of the monthly basic pay to which the member was entitled at the time of discharge or release.[4]	Do.[3]
Third	One-third of the monthly basic pay to which the member was entitled at the time of discharge or release.[5]	Do.[3]
Fourth (and subsequent)	One-sixth of the monthly basic pay to which the member was entitled at the time of discharge or release.[5]	Do.[3]

(b) A member who reenlists—

(1) during his prescribed period of basic recruit training; or

(2) after completing 20 years of active Federal service;

---

[1]Any reenlistment when a bonus was not authorized is not counted.

[2]Two-thirds of the monthly basic pay in the case of a member in pay grade E-1 at the time of discharge or release.

[3]On the sixth anniversary of an indefinite reenlistment, and on each anniversary thereafter, the member is entitled to a bonus equal to one-third of the monthly basic pay to which he is entitled on that anniversary date.

[4]A bonus may not be paid to a member in pay grade E-1 or E-2 at the time of discharge or release.

[5]A bonus may not be paid to a member in pay grade E-1, E-2, or E-3 at the time of discharge or release.

is not entitled to a bonus. A member who reenlists before completing 20 years of active Federal service, but who will, under that enlistment, complete more than 20 years of that service, is entitled to a bonus computed by using as a multiplier only the number of years that, when added to his previous service, totals 20 years.

(c) The total amount that may be paid to a member under this section, or under this section and any other law authorizing a reenlistment bonus, may not be more than $2,000.

(d) An officer of a uniformed service who reenlists in that service within three months after his release from active duty as an officer is entitled to a bonus computed under subsection (a) of this section, if he served as an enlisted member in that service immediately before serving as an officer. For the purposes of this subsection, the monthly basic pay, or appropriate fraction if the member received a bonus for a prior enlistment, of the grade in which he is enlisted, computed in accordance with his years of service computed under section 205 of this title, shall be used in column 1 of the table in subsection (a) of this section instead of the monthly basic pay to which he was entitled at the time of his release from active duty as an officer.

(e) Under regulations approved by the Secretary of Defense, or by the Secretary of the Treasury with respect to the Coast Guard, a member who voluntarily,

or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

(f) The Secretary concerned may prescribe regulations for the administration of this section in his department.

The Act of August 21, 1965, Pub. L. No. 89-132, § 3, 79 Stat. 547 [formerly 37 U.S.C. 308(g)]:

(g) Under regulations to be prescribed by the Secretary of Defense, or the Secretary of the Treasury with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. The additional amount shall be paid in equal yearly installments in each year of the reenlistment period. However, in meritorious cases the additional amount may be paid in fewer installments if the Secretary concerned determines it to be in the best interest of the members. An amount paid under this subsection does not count against the limitation prescribed by subsection (c) of this section on the total amount that may be paid under this section.

ARMED FORCES ENLISTED PERSONNEL BONUS REVISION ACT OF 1974,

Pub. L. 93-277, 88 Stat. 19

An Act to amend chapter 5 of title 37, United States Code, to revise the special pay bonus structure relating to members of the armed forces, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That:

This Act may be cited as the "Armed Forces Enlisted Personnel Bonus Revision Act of 1974".

Sec. 2. Chapter 5 of title 37, United States Code, is amended as follows:

(1) Section 308 is amended to read as follows:

"§ 308. Special pay: reenlistment bonus

"(a) A member of a uniformed service who—

"(1) has completed at least twenty-one months of continuous active duty (other than for training) but not more than ten years of active duty;

"(2) is designated as having a critical military skill by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy;

"(3) is not receiving special pay under section 312a of this title; and

"(4) reenlists or voluntarily extends his enlistment in a regular component of the service concerned for a period of at least three years;

may be paid a bonus, not to exceed six months of the basic pay to which he was entitled at the time of his discharge or release, multiplied by the number of years, or the monthly fractions thereof, of additional obligated service, not to exceed six years, or $15,000, whichever is the lesser amount. Obligated service in excess of twelve years will not be used for bonus computation.

"(b) Bonus payments authorized under this section may be paid in either a lump sum or in installments.

"(c) For the purpose of computing the reenlistment bonus in the case of an officer with prior enlisted service who may be entitled to a bonus under subsection (a) of this section, the monthly basic pay of the grade in which he is enlisted, computed in accordance with his years of service computed under section 205 of this title, shall be used instead of the monthly basic pay to which he was entitled at the time of his release from active duty as an officer.

"(d) A member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

"(e) This section shall be administered under regulations prescribed by the Secretary of Defense for the armed forces under his jurisdiction, and by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

"(f) No bonus shall be paid under this section with respect to any reenlistment, or voluntary extension of an active-duty enlistment, in the armed forces entered into after June 30, 1977."

(2) Section 308a is amended to read as follows:

"§ 308a. Special pay: enlistment bonus

"(a) Notwithstanding section 514(a) of title 10 or any other law, under regulations prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who enlists in an armed force for a period of at least four years in a skill designated as critical, or who extends his initial period of active duty in that armed force to a total of at least four years in a skill designated as critical, may be paid a bonus in an amount prescribed by the appropriate Secretary, but not more than $3,000. The bonus may be paid in a lump sum or in equal periodic installments, as determined by the appropriate Secretary.

"(b) Under regulations prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

"(c) No bonus shall be paid under this section with respect to any enlistment or extension of an initial period of active duty in the armed forces made after June 30, 1977."

Sec. 3. Notwithstanding section 308 of Title 37, United States Code, as amended by this Act, a member of a uniformed service on active duty on the effective date of this Act, who would have been eligible, at the end of his current or subsequent enlistment, for the reenlistment bonus prescribed in section 308(a) or (d) of that title, as it existed on the day before the effective date of this Act, shall continue to be eligible for the reenlistment bonus under that section as it existed on the day before the effective date of this Act. If a member is also eligible for the reenlistment bonus prescribed in that section as amended by this Act, he may elect to receive either one of those reenlistment bonuses. However, a member's eligibility under section 308(a) or (d) of that title, as it existed on the day before the effective date of this Act, terminates when he has received a total of $2,000 in reenlistment bonus payments, received under either section 308(a) or (d) of that title as it existed on the day before the effective date of this Act, or under section 308 of that title, as amended by this Act, or from a combination of both.

Sec. 4. The Amendments made by this Act become effective on the first day of the month following the date of enactment.

Approved May 10, 1974.

37 U.S.C. 906 provides in relevant part:

A member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, who extends his enlistment under section 509 of title 10

is entitled to the same pay and allowances as though he had reenlisted.

The Act of January 2, 1968, Pub. L. 90-235, 81 Stat. 754, as amended by Pub. L. 90-290, 88 Stat. 173 provides in relevant part:

The Secretary concerned may accept original enlistments of persons . . . for a period of . . . six years, in the Regular Navy . . .

Regulations.

DEPARTMENT OF DEFENSE DIRECTIVE 1304.14:

* * *

IV. OBJECTIVES AND POLICIES

B. *Authority to Designate Military Skills*

1. *Designated Military Specialties.* Subject to review and prior approval by the Secretary of Defense, the Secretary of a Military Department may designate a military specialty for award of the Variable Reenlistment Bonus, Shortage Specialty (Proficiency Pay) or a combination of both these awards in accordance with the criteria specified in subsection D. below.

* * *

F. *Reduction and Termination of Awards.* When a military skill is designated for reduction or termination of award an effective date for reduction or termination of awards shall be established and announced to the field at least 90 days in advance. All awards on or after that effective date in military skills designated for reduction of award level will be at the level effective that date and no new awards will be made on or after the effective date in military skills designated for termination of awards.

1. *For Both Variable Reenlistment Bonus and Shortage Specialty (Proficiency Pay).* Secretaries of the Military Departments and the Assistant Secretary of Defense (Manpower and Reserve Affairs) will conduct an annual review of the retention and career manning situation in any military specialty that has attained or is projected to attain a career manning level of more than 105 percent.

a. If it no longer meets the criteria of subsection IV.D. above, it will be designated for either reduction or termination of award.

b. The review will consider the projected retention and career manning situations in the absence of the then current award so that a military specialty will not be designated for reduction or termination of award solely because the then current award has attained and is sustaining adequate retention and career manning in the military specialty.

2. *For Special Duty Assignment (Proficiency Pay).* Secretaries of the Military Departments and the Assistant Secretary of Defense (Manpower and Reserve Affairs) will conduct an annual review of special duty assignments that are designated for Special Duty Assignment (Proficiency Pay).

a. If the combination of total manning level and volunteer manning level do not meet the quantitative criteria in Table IV of reference (c) or the special duty assignment no longer meets the criteria in subsection IV.D. above, it will be designated for either reduction or termination of award.

b. The review will consider the projected volunteer manning and total manning situations in the absence

of the then current award so that a special duty assignment will not be designated for reduction or termination of award solely because the then current award has attained and is sustaining adequate volunteers in the special duty assignment.

3. *For Superior Performance (Proficiency Pay).* Payments to members receiving Superior Performance (Proficiency Pay) will be terminated if their military skill is designated for payment of Shortage Specialty (Proficiency Pay) or Special Duty Assignment (Proficiency Pay).

DEPARTMENT OF DEFENSE DIRECTIVE 1304.15

V. *CRITERIA*

* * *

B. *Individual Eligibility for Receipt of Awards*

1. *Variable Reenlistment Bonus.* An enlisted member is eligible to receive a Variable Reenlistment Bonus if he meets all the following conditions:

* * *

a. Is qualified and serving on active duty in a military specialty designated under provisions of paragraph V.A. 2. above for award of the Variable Reenlistment Bonus. Members paid a Variable Reenlistment Bonus shall continue to serve in the military specialty which qualified them for the bonus unless the Secretary of a Military Department determines that a waiver of this restriction is necessary in the interest of the Military Service concerned.

b. Has completed at least 21 months of continuous active service other than active duty for training im-

mediately prior to discharge, release from active duty, or extension of enlistment.

c. Is serving in pay grade E-3 or higher.

d. Reenlists in a regular component of the Military Service concerned within three (3) months (or within a lesser period if so prescribed by the Secretary of the Military Department concerned) after the date of his discharge or release from compulsory or voluntary active duty (other than for training), or extends his enlistment, so that the reenlistment or enlistment as extended provides a total period of continuous active service of not less than sixty-nine (69) months.

(1) The reenlistment or extension of enlistment must be a first reenlistment or extension for which a reenlistment bonus is payable.

(2) No reenlistment or extension accomplished for any purpose other than continued active service in the designated military specialty shall qualify a member for receipt of the Variable Reenlistment Bonus.

(3) Continued active service in a designated military specialty shall include normal skill progression as defined in the respective Military Service classification manuals.

e. Has not more than eight years of total active service at the time of reenlistment or extension of enlistment.

f. Attains eligibility prior to the effective date of termination of awards in any military specialty designated for termination of the award. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through any modification of an existing service obligation, including any early discharge granted pursuant to 10 U.S.C. 1171, must have been attained prior to the date the authority approving

the modification was notified of the prospective termination or reduction of award in the military specialty.

* * *

Table IV

Quantitative Criteria for Initial/Continued Designation of a Special Duty Assignment for Special Duty Assignment (Proficiency Pay)

Current or Projected Total Manning Level (%)	*Current or Projected Volunteer Manning Level (%)*	*Award*
0-66	0-100	None
67-84	0-50	P-1 ($30)
	51 or above	None
85-94	0-25	P-1 ($50)
	26-66	P-1 ($30)
	67 or above	None
95-100	0-25	P-2 ($75)*
	26-50	P-1 ($50)
	51-75	P-1 ($30)
	76 or above	None

VI. *MAINTENANCE, REDUCTION, AND TERMINATION OF AWARDS*

A. *Variable Reenlistment Bonus.* Members serving in a military specialty designated for reduction or termination of award under the provisions of subsection IV.F. of reference (a), will receive the award level effective on the date of their reenlistment or extension of enlistment, except as provided in paragraph V.B.1.f. above.

* * *

*No P-2 ($75) awards will be authorized until the actual effectiveness, based on Service experience, of the lower awards has been evaluated and approved by the Assistant Secretary of Defense (Manpower and Reserve Affairs).

DEPARTMENT OF NAVY BUREAU OF PERSONNEL INSTRUCTION 1133.18E

From: Chief of Naval Personnel

To: All Ships and Stations (less Marine Corps field addresses not having Navy personnel attached)

Subj: Variable Reenlistment Bonus (VRB) Program

Ref:

(a) DOD Directive 1304.14 of 3 Sep 1970, Subj: Policies for Award of Variable Reenlistment Bonus and Proficiency Pay for Enlisted Personnel of the Military Services (NOTAL)

(b) DOD Instruction 1304.15 of 3 Sep 1970, Subj: Administration of Variable Reenlistment Bonus and Proficiency Pay Program (NOTAL)

(c) DOD Military Pay and Allowances Entitlements Manual

(d) BUPERSMAN

(e) Navy and Marine Corps Military Pay Procedures (NAVSO P3007)

(f) BUPERSNOTE 1040 of 7 July 1971 (Canceled Dec 71)

(g) Federal Income Tax Information for Armed Forces Personnel (NAVSOP 1983 series)

(h) Instructions for Naval Manpower Information System, Part I — Active (NAVPERS 15642)

Encl:

(1) VRB Eligibility List and Multiple Assignments

(2) History of VRB Eligible Ratings/NEC's and Multiple Assignments

(3) Format for Lump-Sum Payment Requests and VRB Information Sheet

(4) Personnel Office Procedures

(5) Brief sheet (detach and utilize as appropriate, then destroy)

1. Purpose. To promulgate revised instructions for administration of the Variable Reenlistment Bonus Program and to call attention to the relationship between the bonus and Reenlistment Quality Control.

2. Cancellation. BUPERS Instruction 1133.18D is hereby canceled and superseded as of 1 July 1972.

3. Background. The Secretary of Defense has placed increased value on the Variable Reenlistment Bonus as a method for increasing first-term reenlistments in critical skill areas. References (a) and (b) delineate policy and implementing provisions for Variable Reenlistment Bonus.

4. Definitions

a. Variable Reenlistment Bonus (VRB). A bonus which may be awarded to an enlisted member who reenlists in a designated rating or NEC in addition to any pay and allowances to which he is otherwise entitled. The VRB may not exceed four times the Regular Reenlistment Bonus payable under Section 308 (a), Title 37, U.S. Code.

b. VRB Multiple. The multiple is established by a relative ranking of all ratings in order of career petty officer shortages. From this ranking, and considering the training investment, an appropriate VRB multiple is assigned to the ratings/NEC's with career petty officer shortages. This determination will be performed when required, and at least annually. Enclosure (1) will be revised accordingly. Enclosure (2) indicates the effective dates and past VRB multiple assignments,

and demonstrates that VRB eligibility changes periodically according to service needs.

c. Reenlistment. The term "reenlistment" as used in this instruction, means any reenlistment, or extension of current enlistment, which creates eligibility for a first Regular Reenlistment Bonus as specified in reference (c).

d. Career Requirements. The number of positions authorized for PO2 and above in each rating and NEC.

e. Career Manning Level. A quantitative index, expressed as a percentage, that measures the extent to which the number of qualified career personnel in a rating or NEC meets Career Requirements in that specialty.

f. Training Investment. A quantitative index which establishes a rating or NEC relative position in an array of all Navy ratings and NEC's. The position in the array is based on the length and cost of formal school training required to qualify first-term personnel in a rating or NEC. The rating NEC having the longest and most costly training will have the highest index.

5. Policy. The general concept and intent of the VRB is to provide a flexible, additional pay incentive to alleviate significant shortages of career petty officers in designated ratings and NEC's by obtaining additional first-term reenlistments.

a. The Variable Reenlistment Bonus, because of its superior effectiveness as a first-term reenlistment incentive, will be used as the principal method of attaining an adequate Career Manning Level in presently undermanned ratings and NECs. The major source

of additional career personnel is the additional first-term reenlistments that can be obtained by the award of extra pay in the form of VRB.

b. It is the intent of the Chief of Naval Personnel that, in utilizing the Variable Reenlistment Bonus as a first-term reenlistment incentive, continued and increasing attention be given to quality performance in those who are reenlisted. Strict adherence to the Reenlistment Eligibility Criteria in reference (d) is required if the professional quality of the career force is to be improved.

c. Members awarded the VRB shall be qualified and normally utilized in the rating NEC on which the bonus is based. Local temporary additional duty, such as shore patrol or training, is not contrary to the intent of this limitation. Members paid a VRB shall continue to serve in the rating NEC which qualified them for the bonus, unless the Secretary of the Navy determines that a waiver of this requirement is necessary in the interest of the Navy.

d. Occasional cases of questionable VRB eligibility may occur incident to conversion to VRB-eligible ratings Guidelines and criteria for special cases are provided in paragraph S. However, if the opinion of the commanding officer, a case does not fall within these criteria, he is to submit the circumstances with his recommendations to the Chief of Naval Personnel (Pers-B221) for decision. The VRB shall not be paid unless a favorable decision is rendered, since erroneous VRB

payments require later bonus recoupment, with attendant financial hardship.

e. VRB eligibility is not retroactive. Entitlement to a VRB vests only on the date the member reenlists (and is entitled to a first-Regular Reenlistment Bonus) and only if his rating or NEC is then currently on the effective list in enclosure (1), and only at the multiple specified therein. To prevent error and misunderstanding, enclosure (1) will always include an effective date of the listing. Retroactive payment of VRB to a member whose rating or multiple has been added to or changed on the list, but who reenlisted before the effective date, cannot be authorized.

6. Determination of Eligible Ratings/NEC's. The following description of the theory and procedures used for determining what ratings and NEC's are eligible for VRB is provided in order to promote a better understanding of the periodic changes which will take place in the listing of VRB-eligible ratings and multiples:

a. A rating/NEC must currently reflect a significant shortage in career manning to be designated for VRB, and there must be a reasonable prospect of enough improvement in Career Manning Level in response to the VRB award to justify its cost.

b. The determination as to whether or not a particular rating/NEC is designated for VRB award is normally based upon a quantitative comparison between the Training Investment and the Career Manning Level

for that particular rating NEC. The rating/NEC must currently reflect, or be projected to reflect, one of the combinations of Training Investment and Career Manning Level shown in the table below:

Quantitative Criteria for Designation of a Specialty for the Variable Reenlistment Bonus

Position in Service Training Investment Array (Percentile)	Current or Projected Career Manning Level
75th or above	95% or less
50th - 74th	90% or less
25th - 49th	80% or less
24th or below	Career inventory less the number of billets authorized for PO1 and above, plus one half (50%) of billets authorized for PO2.

c. Ratings/NEC's with higher Training Investment will require a smaller Career Manning Level shortage to be considered significantly short.

d. The specific VRB multiple assigned to a rating/NEC is contingent on the extent of the Career Manning Level shortage, the Training Investment in the rating/NEC, the career manning improvement to be expected as a result of the VRB award and any other special considerations relevant to the attainment of adequate career manning.

e. A review of current and projected manning and retention situations will be conducted in the ratings NEC's which attain or are expected to attain a Career Manning Level of 105 percent. If it no longer meets the criteria in the table above, the rating/NEC will be designated for a reduction or termination of the award. In such a case, the effective date of the reduction or termination will be announced at least 90 days in advance.

7. Eligibility. To receive the VRB, an individual must meet all the following requirements for which no waivers will be made, except as provided for in paragraph 8.

a. Be eligible for continuous service reenlistment in the Regular Navy in accordance with article 1040300, or for extension of active duty enlistment in accordance with article 1050150 of reference (d). No reenlistment or extension accomplished for any purpose other than continued active service in the designated rating/NEC shall qualify a member for receipt of the VRB.

b. Be eligible for first-Regular Reenlistment Bonus under the provisions of reference (c). Prior broken service in any of the Uniformed Services does not bar payment, provided member is eligible for first-Regular Reenlistment Bonus.

c. Be a petty officer in a VRB-eligible rating or NEC, or be an identified striker for a VRB eligible rating serving in pay grade E-3.

d. Have completed at least 21 months of continuous active service, other than active duty for training, immediately prior to becoming eligible for the first-Regular Reenlistment Bonus.

e. Extend or reenlist in the Regular Navy for a period which, when combined with current prior active service, totals not less than 69 months of continuous active service.

f. Have not more than 8 years of total active duty. (Active duty is defined as full time duty in the active service of a uniformed service, including duty on the active list, full time training duty, annual training duty, and attendance while in the active service,

at a school designated as a service school by law or by the Secretary of the Navy.)

g. In applicable cases, reenlist within 3 months after discharge or release from active duty.

h. Attain eligibility prior to the effective date of termination of the VRB award in a rating/NEC designated for termination. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through an early discharge for the purpose of immediate reenlistment, or extension of enlistment, or other modification of an existing service obligation including any early discharge granted pursuant to article 3840240 of reference (d) (discharge within 3 months of expiration of active obligated service) shall be attained prior to the date the authority approving the modification is notified of the prospective termination or reduction of award in the rating NEC. This is the date a command receives the Bureau of Naval Personnel directive announcing termination or reduction of awards in the rating/NEC.

8. Special Cases. The following criteria govern special cases:

a. Eligibles. Petty officers converting from one rating to another rating are eligible for VRB if all of the eligibility requirements in paragraph 7 are met in addition to the following requirements:

(1) The petty officer must complete conversion to a VRB-eligible rating prior to entering into a bonus-length extension of his first enlistment.

(2) The conversion rating must be eligible for the VRB at the time of reenlistment or extension of enlistment.

(3) Petty Officers converting from one VRB-eligible rating to another VRB-eligible rating, and not under the SCORE Program, are not eligible for VRB until conversion is complete. If conversion is not completed prior to termination of the present enlistment, a non-bonus-eligible extension of 1 year may be entered into, provided it does not conflict with the provisions of article 1050150 of reference (d).

(4) To be eligible for VRB, petty officers and identified strikers reenlisting under the SCORE Program must reenlist under the continuous service criteria of article 1040300 of reference (d), and must convert only to a rating assigned the same or a higher VRB multiple at the time of reenlistment.

(5) Qualified personnel are permitted to convert from a higher to a lower VRB multiple under the SCORE Program. When necessary, personnel will be permitted to extend for a nonbonus period, and then after successful conversions, be reenlisted in their new rating. These personnel would then be eligible for VRB, providing their new rating was on the current VRB eligibility list.

b. Non-eligibles

(1) Petty officers in ratings currently eligible for VRB, converting to a non-eligible rating, are not eligible for the VRB. The process of conversion is defined as any administrative action, voluntary or involuntary, initiated by the individual or the Navy, to accomplish a change of rating.

(2) Personnel in a rating not eligible for VRB, who have less than 2 years remaining on their enlistment, and for SCORE Program eligibility would have to reenlist before conversion to have the required 6

years of obligated service, are not eligible to receive VRB.

c. Reenlistments Within 3 Months After Separation From Active Service. When VRB-eligible personnel reenlist within 3 months after separation. VRB payment cannot be made until eligibility for the first-Regular Reenlistment Bonus is established. Procedures for establishing eligibility for the first-Regular Reenlistment Bonus are listed in paragraph 10902b of reference (e).

d. NESEP Candidates. Petty officers reenlisting to meet the minimum service requirements for NESEP, NENEP, or NEDEP, or for other programs leading to commissioned status, are not eligible for VRB for such reenlistment.

(1) In cases in which an extension will fulfill the minimum service requirements for NESEP, NENEP or NEDEP, eligible members may continue to receive annual VRB installments to which previously entitled under the current reenlistment contract if applicable.

(2) VRB payments for reenlistments contracted subsequent to NESEP, NENEP, and NEDEP application, but prior to selection for such training will be held in abeyance pending results of the selection process. Applicants not selected for training, and otherwise eligible, may receive VRB. Those selected will not receive VRB.

9. Reenlistment Interview. To attain the objectives of the VRB Program, each potential reenlistee who would be eligible for the VRB, or may become eligible due to conversion or attainment of a new NEC, must be informed of his eligibility and the monetary benefits of the VRB Program.

a. The Reenlistment Interview, held 6 months before EAOS in accordance with reference (f), must cover the following additional subjects:

(1) VRB eligibility.

(2) Present reenlistment intentions.

(3) Amount of VRB for which potential reenlistee is currently eligible.

(4) VRB Program flexibility and possibility of changes which might increase or decrease the amount of bonus to which entitled at the time of reenlistment.

(5) Any limiting factor which could make VRB payment questionable.

(6) Advantages of early reenlistment to obtain present amount of VRB vice uncertainty of future value of the VRB.

(7) Normal VRB payment method of equal annual installments (see par. 10).

(8) Combat zone income tax exemption, if applicable (see par. 15).

(9) Possibility of payment in one lump sum if deemed desirable by the commanding officer in the particular case (see par. 10).

10. Method of Payment. The VRB is to be paid in equal annual installments in each year of the enlistment period. The first installment is to be paid upon reenlistment and subsequent installments on each succeeding anniversary during the new enlistment. It is emphasized that this is the *normal* method of payment provided for in the public law (Title 37, U.S. Code).

a. In especially meritorious cases, VRB can be paid in one lump sum at the time of reenlistment,

or the remaining amount after reenlistment. These methods require the approval of the Chief of Naval Personnel. Because of the impact that accelerated payments make on the funds allocated to the Navy for VRB, such awards can be made only to highly deserving personnel.

(1) In considering the submission of requests for lump-sum VRB payment, commanding officers are enjoined to keep in mind the joint objectives of the VRB Program and Reenlistment Quality Control. In consonance with these objectives, *it is appropriate that requests for lump-sum VRB payment be signed by the commanding officer in order to insure command's personal attention; however, this does not preclude command's authority to delegate.* Determination of meritorious payment is made only after careful review of the reasons for the request, the applicant's performance record and disciplinary history, and the commanding officer's recommendation.

(2) Because of the frequent *changes in the VRB Program,* lump sum requests shall not be submitted more than 90 days prior to intended reenlistment. To permit payment at reenlistment, the request should be submitted 45 days in advance, or as soon thereafter as the reenlistment decision is made.

b. Requests for lump sum or remaining amount payments are to be submitted to the Chief of Naval Personnel (Pers-B221) in the format shown in enclosure (3). The reasons for submitting payment requests in this format are:

(1) To increase the commanding officer's role in the use of the VRB Program in pursuit of reenlistment objectives.

(2) To assist the commanding officer in pursuing Reenlistment Quality Control by providing a concise recap of the reenlistee's current record in the VRB Information Sheet.

(3) To reduce the overall processing time for requests.

(4) To reduce the number of erroneous VRB payments by generating increased awareness of the entitlement requirements.

c. If the individual's VRB is subject to Federal income tax and lump-sum payment is requested, the possible advantage of Income Averaging described in reference (g) should be explained to him.

d. The VRB Information Sheet in enclosure (3) is meant to serve as a quality control tool and reenlistment checkoff guide to assist the commanding officer at the time of reenlistment. It provides the commanding officer a terse, capsule abstract portrayal of the prospective reenlistee's performance potential.

11. Personnel Office Procedures. Required service record entries, personnel diary entries, and substantiation procedures are described in enclosure (4). It is essential that commanding officers insure complete and accurate entries, as this information provides supporting data for budget requests to fund this program.

12. Disbursing Procedures. Disbursing procedures are described in chapter 9 of reference (e). Complete and accurate reporting is essential to provide data for budget justification. Attention is directed to paragraph 10931 of reference (e).

13. Nonapplicability of Reenlistment Bonus Limitation. The amount of VRB is not considered in the

$2,000 limitation on the total amount of Regular Reenlistment Bonus which may be paid under paragraph 10906 of reference (c). However, this limitation does apply to the Regular Reenlistment Bonus amount used in computation of the VRB. Therefore, the maximum value for the VRB is $8,000 (maximum, multiple 4 times the $2,000 maximum Regular Reenlistment Bonus) and the maximum total bonus is $10,000.

14. Recoupment

a. Requirement. The unearned portion of the VRB payment already paid must be recouped when a member voluntarily or because of misconduct does not complete the term of enlistment, extension of enlistment or anniversary year for which the bonus was paid. Paragraph 10922 of reference (c) lists the specific circumstances which require recoupment. If a member who is entitled to VRB is receiving it in equal annual installments, and fails to complete his enlistment under conditions which do not require recoupment of the reenlistment bonus, the balance of the unpaid VRB installments remaining is payable in a lump-sum and is to be included in the final settlement of the pay account.

b. Recoupment Action by the Commanding Officer. A certificate (in triplicate) will be furnished the disbursing office. (See par. 3840160 of ref. (d).)

c. Lump-Sum Payment Action by the Commanding Officer. A DD Form 114 (in triplicate) will be furnished to the disbursing officer. (See paragraph 10916 of reference (e).)

15. Withholding Tax

a. Reenlistment in Combat Zone. When the reenlistment for which VRB is payable occurs in a calendar month during any part of which the member served

in a combat zone, or was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone, the initial and subsequent installments are *not subject to withholding tax* and need not be reported as income subject to tax, regardless of when payment is made or where the member is then located.

b. Reenlistment Outside Combat Zone. If the reenlistment for which VRB is payable occurs in a month during no part of which the member served in a combat zone, then the VRB is subject to withholding tax and will be taxed in the same manner as the Regular Reenlistment Bonus, and each subsequent annual installment is subject to withholding tax and will be taxed in the year in which paid. *Even if payment of subsequent installments occurs while the member is in a combat zone, such installments are subject to withholding tax and must be reported as income subject to tax.*

16. Authorization

a. The Variable Reenlistment Bonus (VRB) is authorized by Section 308, Title 37, U.S. Code. The entitlements portion of the instruction was approved by the DOD Military Pay and Allowances Committee under procedures prescribed by the Secretary of Defense, in accordance with Section 1001, Title 37, U.S. Code.

b. This instruction conforms with Secretary of Defense instructions specified in reference (a) and (b).

JOHN G. FINNERAN
Acting Deputy Chief of Naval Personnel
(23 March 1972)

DEPARTMENT OF NAVY BUREAU OF PERSONNEL INSTRUCTION 1133.18E, CHANGE 2

From: Chief of Naval Personnel

To: All Ships and Stations (less Marine Corps field addresses not having Navy personnel attached)

Subj: Variable Reenlistment Bonus (VRB) Program

Encl:

(1) VRB eligible ratings/NEC's with multiples effective 1 July 1973

(2) History of VRB eligible ratings/NEC's and VRB multiples assigned

(3) Brief sheet (detach and utilize as appropriate, then destroy)

1. Purpose. To transmit change 2 to the basic instruction.

2. Action. On 1 July 1973, remove existing enclosures (1) and (2) to the basic instruction and substitute revised enclosures (1) and (2), appended hereto.

ROBERT B. BALDWIN
Deputy Chief of Naval Personnel
(22 March 1973)

History of VRB Eligible Ratings/NECs and VRB Multiples
Assigned Since 1 July 1968
Enclosure (2)

Rating	7/1/68	1/1/69	7/1/69	7/1/70	7/1/71	7/1/72	11/1/72	7/1/73
AC	1	1	3	4	4	4	4	4
AQ	4	4	4	4	4	4	4	4
AW	—	4	4	4	4	4	4	4
BT	4	4	4	4	4	4	4	4
CTO	—	—	—	4	4	4	4	4
EA	2	2	2	2	—	—	—	4*
EW	—	—	—	—	4	4	4	4
GMT	3	3	3	3	4	4	4	4
HT	—	—	—	—	4	4	4	4
IC	4	4	4	4	4	4	4	4
IM	2	2	2	2	4	4	4	4
MM	4	4	4	4	4	4	4	4
OS	4	4	4	4	4	4	4	4
OT	—	—	—	—	4	4	4	4
PT	4	4	4	4	4	4	4	4
RM	4	4	4	4	4	4	4	4
ST	4	4	4	4	4	4	4	4
TM	3	3	3	3	3	4	4	4
NEG's								
3351	—	—	—	—	—	—	4	4
3353	—	—	—	—	—	—	4	4
3354	—	—	—	—	—	—	4	4
3355	—	—	—	—	—	—	4	4
3356	—	—	—	—	—	—	4	4
3359	—	—	—	—	—	—	4	4
3361	—	—	—	—	—	—	4	4
3363	—	—	—	—	—	—	4	4
3364	—	—	—	—	—	—	4	4
3365	—	—	—	—	—	—	4	4
3366	—	—	—	—	—	—	4	4
3383	—	—	—	—	—	—	4	4
3384	—	—	—	—	—	—	4	4
3385	—	—	—	—	—	—	4	4
3386	—	—	—	—	—	—	4	4
3389	—	—	—	—	—	—	4	4
3393	—	—	—	—	—	—	4	4
3394	—	—	—	—	—	—	4	4
3395	—	—	—	—	—	—	4	4

Rating	7/1/68	1/1/69	7/1/69	7/1/70	7/1/71	7/1/72	11/1/72	7/1/73
3396	—	—	—	—	—	—	4	4
ABE	—	—	—	—	—	3	3	3
AE	3	3	3	3	3	3	3	3
AG	1	1	1	2	2	2	2	3*
AT	4	4	4	4	4	4	3	3
*BU	2	2	2	2	—	—	—	3
*CE	2	2	2	2	—	—	—	3
*EM	4	4	4	4	4	4	4	3
*EN	4	4	4	4	4	4	4	3
*FTG	4	4	4	4	4	4	4	3
*JO	—	—	—	—	—	—	—	3
MN	—	—	—	—	—	3	3	3
MR	3	3	3	3	3	3	3	3
OM	3	3	3	3	3	3	3	3
PH	—	—	—	—	3	3	3	3
PM	1	1	1	3	3	3	3	3
QM	4	4	4	3	3	3	3	3
SM	3	3	3	3	3	3	3	3
*UT	2	2	2	2	—	—	—	3
AMH	1	1	1	2	2	2	2	2
AO	3	3	3	3	3	3	2	2
*AS	—	—	—	—	3	3	3	2
*AX	4	4	—	—	4	4	4	2
*CTA	—	—	—	3	3	3	3	2
CTI	—	—	—	4	4	4	2	2
CTT	—	—	—	4	4	4	2	2
*DM	—	—	—	—	—	—	—	2
DP	4	4	4	4	3	3	2	2
DS	4	4	4	4	4	4	2	2
ET	4	4	4	4	4	4	2	2
FTB	4	4	4	4	4	4	2	2
FTM	4	4	4	4	4	4	2	2
*ML	—	—	—	—	—	—	—	2
MU	—	—	—	—	—	2	2	2
*SW	2	2	2	2	—	—	—	2
*TD	—	—	—	3	3	3	3	2
*ABF	—	—	—	—	—	—	—	1
*ADJ	—	—	—	—	—	—	—	1
*BM	—	—	—	—	—	—	—	1
*DT	—	—	—	—	—	—	—	1
*GMM	—	—	—	—	3	3	2	1

Rating	7/1/68	1/1/69	7/1/69	7/1/70	7/1/71	7/1/72	11/1/72	7/1/73
*HM	—	—	—	—	2	2	2	1
HM NECs								
8404	2	—	—	—	—	—	—	—
8405	2	—	—	—	—	—	—	—
8406	2	2	2	2	—	—	—	—
8409	2	—	—	—	—	—	—	—
8412	—	—	—	2	—	—	—	—
8413	2	—	—	—	—	—	—	—
8414	—	—	—	2	—	—	—	—
8416	—	—	—	2	—	—	—	—
8417	2	—	—	2	—	—	—	—
841X	—	—	2	—	—	—	—	—
8432	2	2	2	2	—	—	—	—
8483	2	—	—	—	—	—	—	—
8484	2	—	—	—	—	—	—	—
8488	2	—	—	—	—	—	—	—
8489	2	—	—	—	—	—	—	—
8492	2	2	2	2	—	—	—	—
8493	2	2	2	2	—	—	—	—
8498	2	2	—	—	—	—	—	—
LN	—	—	—	—	—	—	—	1*
PN	—	—	—	—	—	—	—	1*
YN	—	—	—	—	—	—	—	1*
AME	1	1	1	2	2	2	2	—*
AMS	1	1	1	2	2	2	2	—*
CM	2	2	2	2	—	—	—	—
CT	4	4	4	—	—	—	—	—
CTM	—	—	—	4	4	—	—	—*
CTR	—	—	—	4	4	4	2	—*
CS	1	1	1	1	—	—	—	—
DC	4	4	4	4	4	—	—	—
DK	2	2	2	2	2	—	—	—
EO	2	2	2	2	—	—	—	—
GMG	3	3	3	3	—	—	—	—
MT	2	—	—	—	4	4	2	—*
SK	1	1	1	1	—	—	—	—
SF	4	4	4	4	4	—	—	—

Notes:
Asterisk (*) indicates VRB additions, deletions, or changes in multiples over the fiscal year 1973 VRB program.
Dash (—) Indicates multiple of zero, not VRB eligible.

BUREAU OF NAVAL PERSONNEL MANUAL ARTICLE 1050150.

(January 1974)

EXTENSIONS OF ENLISTMENTS

1. Definitions. In the discussion of extensions of enlistments in this article, the following definitions are applicable:

a. "Agreement to extend enlistment" or "enlistment as extended" refers to the legal form of agreement, Agreement to Extend Enlistment, NAVPERS 1070/621, Page 1A of the service record, and not to an unofficial agreement or personal assurance of intention to extend. Agreements on other than the legal form are of an informal and unofficial nature and could be repudiated or withdrawn by the member. Clerical instructions for preparation of the Page 1A are contained in the JUMPS Field Procedures Handbook, NAVSO P-3086.

b. "Execution of the Agreement to Extend Enlistment" or "execution of extension" refers to the signature of NAVPERS 1070/621 by the member concerned and an official authorized in this article to accept the agreement in behalf of the Navy.

c. "Extension becomes operative" or "operative date" refers to the date on which the extension begins to run, that is, the date next following the normal date of expiration of enlistment, or the date of expiration of enlistment as extended or as adjusted for the purpose of making up time not served, as appropriate. Extension agreements may not be cancelled after the operative date. In any case in which it appears that the extension should have been cancelled, the Agreement to Extend Enlistment shall be completed and the case referred to the Chief of Naval Personnel for decision.

d. "Extension becomes binding" refers to the date on which the extension is executed (signed), after which it may not be cancelled except in accordance with the provisions of this Manual in effect at the time the agreement is signed.

2. Following are the general terms and conditions under which Regular Navy and Naval Reserve personnel serving on active duty are permitted to extend their enlistments:

a. Except as otherwise provided herein, enlisted personnel who are serving under an enlistment contract may extend or re-extend their enlistments by their voluntary agreement, subject to approval by their commanding officer regardless of whether serving in first or subsequent enlistment. Extensions may be for any period of months not to exceed an aggregate of 48 months on any single enlistment.

* * *

3. Execution of an Agreement to Extend Enlistment.

* * *

(2) Unconditional agreements to extend enlistment up to a maximum of 48 months may be executed at any time during an enlistment. An availability report shall be submitted promptly in these cases in accordance with the Enlisted Transfer Manual and the following reason for extension entered on the Page 1A:

"To continue career. I understand that this extension becomes binding upon execution and may not thereafter be cancelled except as provided in BUPERSMAN 1050150."

* * *

Enlistment—Unconditional Extension (months)
First—24 through 48

* * *

4. At the time the extension becomes operative or as soon thereafter as practicable, the remaining portions of the Agreement to Extend Enlistment form shall be completed. It should be noted that even though this part of the extension form is not completed at the proper time, the legality is not affected and the operative date is not changed.

* * *

8. An extension agreement is cancelled by completing the appropriate portion of the Page 1A. A valid extension of enlistment that has become operative cannot be cancelled. If it appears that an extension should have been cancelled, complete the Agreement to Extend Enlistment and refer the case to the Chief of Naval Personnel for decision. Requests or recommendations for cancellation of agreements to extend enlistments which have not become operative and for which authorization is not provided below and which appear meritorious, shall be forwarded to the Chief of Naval Personnel for determination.

9. Commanding officers shall cancel agreements to extend enlistment, prior to operative date:

a. When a member is on unauthorized absence on date his enlistment would otherwise expire, unless it is considered by the commanding officer that intention to absent himself was for the purpose of abrogating the agreement to extend.

b. When closing a member's record because of desertion.

c. Except as provided below, when a member, through no fault of his own, has failed to receive any of the benefits for which the extension was executed by the day next preceding the operative date of the extension. Thus, if a member executed an agreement to extend enlistment and has not been ordered or assigned to duty, such as duty ashore, overseas service, or any special program, for which he agreed to extend or has not had his PRD adjusted, not been advanced, or has not received any benefits therefrom, by the day next preceding the date the extension would become operative, the agreement to extend enlistment shall be cancelled. Members whose extensions are cancelled pursuant to the above who desire to continue on active duty may simultaneously therewith execute new extension or reenlist in accordance with appropriate articles in this Manual notwithstanding the time limits herein specified. In such cases if the member executes a new extension, show as a reason "To continue career."

d. When appropriate where a member is disenrolled from a specialized course of instruction (see appropriate article in this Manual). Cite this article as cancellation/reexecution authority.

e. When a member reenlists or executes another extension of enlistment. The extension(s) shall then be cancelled as of the date of reenlistment or execution of new extension. The following general guidelines are applicable when reenlistment/extensions are effected under this authority:

(1) Reenlistment or extension must be for an authorized period but not less than the term of the extension agreement(s) being cancelled.

(2) A member eligible to receive a variable reenlistment bonus (VRB) shall reenlist for a period which exceeds by at least two years the period of service for which already obligated.

(3) A member reenlisting three months or less prior to the normal expiration of enlistment is considered to have completed his initial contract. For example, if a member is seving in an enlistment for four years with an agreement to extend his enlistment for two years and is discharged for the purpose of immediate reenlistment after serving three years and nine months of the enlistment, he may reenlist for a minimum period of two years if not eligible for VRB. If eligible for VRB, reenlistment under these circumstances must be for a minimum period of four years.

. . .

g. When the extension resulted in no significant benefit to a member no longer recommended for reenlistment because of failure to meet the minimum reenlistment standards set forth in this Manual and BUPERSINST 1133.22 series, or unsatisfactory performance of duty or conduct, and who, in the opinion of the commanding officer, lacks career potential. A full statement of the facts shall be included in a Page 13 service record entry with notation that the member is not recommended for reenlistment. When cancellation of an agreement to extend is recommended under the above provision but a significant benefit resulted from the extension, e.g., nuclear power or advanced electronics training, accompanied overseas tour, or advancement, the case shall be forwarded to the Chief of Naval Personnel for determination in time to permit a decision prior to the operative date.

DEPARTMENT OF DEFENSE PAY AND ENTITLEMENT MANUAL.

Chapter 9

Special Pay—Reenlistment Bonus—Enlisted Members

Section A—

Regular Reenlistment Bonus

(37 U.S.C. 308 (a) through (c))

* * *

10905. Time of Payment

Payment of regular reenlistment bonus is normally made on the day the member reenlists. A member who extends his enlistment for 2 years or more is not paid the bonus for the extension until he actually begins serving the extension.

* * *

Section B—

Variable Reenlistment Bonus

37 U.S.C. 308(g)

10911. Variable Reenlistment Bonus (VRB)

* * *

10913. Method and Intervals of Payment

The VRB is paid in equal annual installments. The first installment is payable at the same time the regular reenlistment bonus is paid. Later installments are payable on the anniversary date in each year of the reenlistment period, unless there is lost time. In this case the subsequent installment payments are delayed by the number of days of lost time. Payment may be made in fewer installments in meritorious cases when authorized. Application for reduction in the number of installments is processed in accordance with the prescribing personnel directives of the service concerned.